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In the Supreme Court of the United States

TYSON A. DITCH, PETITIONER

v.

JAMES L. GRACE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the complete denial of a criminal defendant's Sixth Amendment right to be represented by counsel at a critical stage of the prosecution creates a "presumption of prejudice" under this Court's decision in *United States* v. *Cronic*, 466 U.S. 648 (1984), that compels reversal of the conviction.

PARTIES TO THE PROCEEDINGS

Petitioner Tyson A. Ditch was the petitioner-appellant in the court below. Respondent James L. Grace was the respondent-appellee below. There are no other parties.

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INTRODUCTION

In *United States* v. *Cronic*, this Court explained that a "complete denial of counsel" at a "critical stage of [the defendant's] trial" was one of "three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in particular case is unjustified." 466 U.S. at 659. "The Court has uniformly found constitutional error without any showing of prejudice," the Court stated, "when counsel was * * * prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25 (collecting cases).

The court below acknowledged that the preliminary hearing at which petitioner Ditch was denied counsel in this case—a hearing at which witness testimony was presented and the government bore the burden of establishing that the defendant committed the crime at issue by a preponderance of the evidence—was a "critical stage" of the proceeding. Nonetheless, rather than order automatic vacatur of his conviction, the court instead conducted a "harmless error" analysis to determine whether he was prejudiced by that denial.

This case thus provides the Court with an opportunity to address the vital question of whether the complete denial of counsel at a critical stage of criminal proceeding—an undisputed Sixth Amendment violation—mandates reversal of a criminal conviction. This question not only has divided the lower courts, but also arises in thousands of cases annually on account of the fact that preliminary hearings like that below are routine practice in the courts of some thirty-five States and the federal government. Certiorari is warranted to establish that courts may not conduct an individualized, "harmless error" analysis where a criminal defendant has been denied counsel at a critical stage of the proceeding, such as a preliminary hearing.

OPINIONS BELOW

The report and recommendation of the magistrate judge and the opinion of the district court adopting the magistrate judge's recommendation (Pet. App. 1a-46a and 47a-48a, respectively) are unreported. The Third Circuit's opinion affirming the decision of the district court (Pet. App. 49a-64a) is reported at 479 F.3d 249 (3d Cir. 2007). The Third Circuit's order denying rehearing *en banc* (Pet. App. 65a-68a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on March 1, 2007, and the order of the court of appeals denying petitioners' petition for rehearing *en banc* was entered on March 26, 2007. On June 22, 2007, this Court granted petitioner a 30-day extension of time within which to file the petition for certiorari, to and including July 24, 2007. The petition was timely filed on that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This petition involves the Sixth Amendment to the U.S. Constitution, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

STATEMENT

At approximately 3 o'clock in the morning on February 18, 1998, Dasha Yenny reported to police that someone had fired shots from a gun into the front door of the apartment where she, her child, and her boyfriend were sleeping. Ronald Fry, a neighbor in an apartment near Yenny's apartment, reported to the investigating officer that he had heard shots fired into Yenny's door. Although legally blind, Fry further reported that he had looked out of his window towards the front of the building and "saw" an individual, described at the time simply as "a single

male," leave the apartment building shortly after the shots were fired. According to Fry, this individual male got into a white car and left the scene. Later that morning, the State Police executed a search warrant on petitioner's brother's home and found petitioner, a former boyfriend of Yenny, sleeping in the attic of the residence. Petitioner was then taken into custody. Pet. App. 50a.

A. The Denial of Counsel at Petitioner's Preliminary Hearing

At a preliminary hearing nearly four months later, petitioner was charged by the Pennsylvania State Police with several crimes related to the shooting at the apartment: criminal attempt to commit burglary; reckless endangerment; unlawful possession of a firearm; and criminal mischief. Prior to the start of the hearing, petitioner repeatedly raised concerns to the officers accompanying him to the courtroom that he did not yet have an attorney representing him. Petitioner reiterated these concerns to the judge prior to the hearing. He informed the judge that he and his friends and family had contacted the office of a specific attorney known to petitioner several times, but that the attorney had not yet returned his call. The judge, however, told petitioner that it had been 20 days since the arraignment and that the case needed to proceed.

The judge then urged petitioner to waive his right to counsel so that the preliminary hearing could proceed. Petitioner refused to sign the Waiver of Counsel form, stating that he wished to have counsel present at the preliminary hearing given the serious nature of the charges against him and his inability to represent himself effectively at the hearing. Even though petitioner did not sign the waiver form and did not otherwise waive his right to counsel, the judge proceeded to conduct the preliminary hearing without an attorney present on petitioner's behalf.

APPENDIX D

UNITED STATES COURT OF
APPEALS FOR THE THIRD
CIRCUIT

No. 05-3614

TYSON ALAN DITCH,
Appellant,

v.

JAMES L. GRACE.

March 26, 2007, Decided

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,
SLOVITER, McKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES, JORDAN
and COWEN, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular

During the preliminary hearing, several witnesses—the victim, Fry (the legally blind eyewitness), the investigating State Trooper, and four other State Police Officers—were called to testify. Although the hearing was held four months after the incident, and although Fry was a key eyewitness, there had been no line-up or photo array prior to the preliminary hearing. Nevertheless, Fry was allowed to observe police officers lead petitioner into the courtroom in handcuffs and prison clothing and could examine petitioner while he sat at the defendant's table during the course of the hearing. Once called to testify, Fry identified the unrepresented petitioner as the person leaving the apartment building on the night of the shooting. A phone trace, a firearms inquiry, and a ballistics test, which had also contributed to the issuance of a search warrant and arrest of petitioner, were also the subject of testimony and evidentiary presentations at the preliminary hearing. Although petitioner took some notes on paper provided by the judge, he did not question any of the witnesses or present any testimony himself.

B. The Ineffective Assistance of Petitioner's Counsel at Trial

"The only witness who identified Petitioner as the assailant was legally blind at the time of the shooting." Pet. App. 2a. But notwithstanding the fact that the state's key eyewitness was blind, petitioner's trial attorney did not file any pretrial motion to suppress the in-court identification or other evidence introduced at the preliminary hearing. Nor did his attorney seek to obtain a second preliminary hearing with the benefit of counsel. Thus, the prior in-court identification as well as the State Trooper's evidence and testimony from the preliminary hearing, were allowed to stand unchallenged during the subsequent trial. Moreover, the investigating State Trooper was not present at petitioner's trial and therefore was never questioned or examined by petitioner or his attorney at any

point before or during the trial. Petitioner was convicted of criminal attempt to commit burglary, reckless endangerment, unlawful possession of a firearm, and criminal mischief, and was sentenced to 7.5 to 15 years in prison. Pet. App. 2a.

C. Federal Court Proceedings

After exhausting his appeals in the Pennsylvania state courts, petitioner filed a petition for writ of habeas corpus in the district court. Petitioner challenged several aspects of his conviction, including the trial court's denial of counsel at the preliminary hearing. The district court denied both the petition and a Certificate of Appealability. Pet. App. 48a. The Third Circuit, however, granted petitioner's request for a Certificate of Appealability with respect to two issues: (1) whether the district court erred in denying his petition for a writ of habeas corpus as to petitioner's claim that he was denied his constitutional right to counsel at his preliminary hearing; and (2) whether the district court erred in denying his petition for writ of habeas corpus as to the claim that he was deprived of effective assistance of counsel because trial counsel failed to file a motion to suppress the identification that occurred at the uncounseled preliminary hearing. Pet. App. 51a.

As to the question whether petitioner was wrongfully denied counsel at his preliminary hearing, the court found a violation of the Sixth Amendment. In reaching that conclusion, the Third Circuit first held that a preliminary hearing in Pennsylvania is a "critical stage" of a criminal prosecution. Pet. App. 53a.

The court explained that, at a Pennsylvania preliminary hearing, the state might recommend that the defendant be discharged or bound over to the court. *Id.* at 53a-54a. Moreover, the principal function of the preliminary hearing in Pennsylvania is to protect the accused's right against unlawful arrest and detention, and the state bears

the burden of establishing both a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it. *Ibid.* The preliminary hearing is not, moreover, just a forum for the prosecution. The defendant may: (1) be represented by counsel; (2) cross-examine witnesses and inspect physical evidence; (3) call witnesses on his behalf; (4) offer evidence on his behalf; (5) testify; and (6) make written notes of the proceedings. 234 Pa. Code 542(C) (1998). Having found that the preliminary hearing was a "critical stage" and that petitioner did not waive or forfeit his right to counsel, the court concluded that petitioner was denied counsel at the preliminary hearing in violation of the Sixth Amendment.

In addressing the appropriate relief for the Sixth Amendment violation, the court rejected petitioner's argument that complete denial of counsel at a critical stage of the proceeding warrants automatic vacatur of his conviction. The court first reasoned that neither *Coleman* v. *Alabama*, 399 U.S. 1 (1970), which involved a remand for a harmless error analysis following denial of counsel at a preliminary hearing, nor *White* v. *Maryland*, 373 U.S. 59 (1963), which found structural error requiring vacatur following denial of counsel at a preliminary hearing where an admission of guilt was entered, was apposite. Pet. App. 56a. Instead, the court "found solace" for its decision in a line of cases prescribing a harmless error test for situations involving admission of evidence at trial of uncounseled pre-trial identifications. *Id.* at 56a-57a (citing *Gilbert* v. *California*, 388 U.S. 263 (1967), and *Moore* v. *Illinois*, 434 U.S. 220 (1977)). In doing so, the Court focused exclusively on the identification at the preliminary hearing, ignoring the effect of the constitutional violation on petitioner's other rights at a preliminary hearing, which include the right to question witnesses, introduce evidence, or take notes of the proceeding, which might help in preparing a defense.

Notwithstanding its conclusion that a preliminary hearing was a "critical stage" of the proceeding against petitioner, the court rejected the argument that it should apply the presumption of prejudice from *United States* v. *Cronic*, 466 U.S. 648 (1984). Pet. App. 59a. In *Cronic*, the Court "identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Id.* at 659. Among these circumstances is a "complete deni .l of counsel" at a "critical stage." *Ibid.*[1] Petitioner therefore argued that, because he was denied counsel at a "critical stage" of the prosecution, he was entitled to the presumption of prejudice under *Cronic* and vacatur of his conviction. Pet. App. 58a.

The court disagreed, expressly adopting the reasoning of the Fourth Circuit in *United States* v. *Owen*, 407 F.3d 222 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1026 (2006) (even though the reasoning it adopted was not necessary to the outcome of that case, as the court there found that the defendant waived his right to counsel, obviating the need to address the applicability of *Cronic*). Rather than recognize the presumption of prejudice for a complete denial of counsel at any "critical stage," the decision below creates a new sub-set of Sixth Amendment violations involving complete denial of counsel at critical stages that

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[1] The Court in *Cronic* also noted that no specific showing of prejudice was required in *Davis* v. *Alaska*, 415 U.S. 308 (1974), because the petitioner there was "denied the right of effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 318. Thus, under *Cronic*, petitioner was entitled to a presumption of prejudice both because he was completely denied counsel and because he was unable to cross-examine the investigating State Trooper at trial. The court below, however, did not address Petitioner's inability to cross-examine the trooper; it addressed only the "complete denial" of counsel.

are *not* subject to the *Cronic* presumption of prejudice. Pet. App. 59a. Relying on a "narrow usage of the phrase 'critical stage' to mean a proceeding at which a denial of counsel would necessarily undermine the reliability of the entire criminal proceeding," the court below concluded that the actual denial of counsel at petitioner's preliminary hearing did not warrant the presumption of prejudice under *Cronic*. *Ibid.* The court provided no rationale for its conclusion that denial of counsel at a preliminary hearing in Pennsylvania does not undermine the entire criminal proceeding. But having determined that the presumption of prejudice did not apply, the court applied a harmless error test, concluded that the error was harmless, and affirmed the district court. *Id.* at 62a.[2]

This petition followed.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment entitles a defendant to the assistance of counsel at "any critical stage" of a criminal prosecution. *Kirby* v. *Illinois*, 406 U.S. 682, 690 (1972). Although courts have identified a myriad of "critical

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[2] The court also found that petitioner's trial counsel's performance "fell below an objective standard of reasonableness" under the first prong of the two-part *Strickland* test. Pet. App. 63a; *Strickland* v. *Washington*, 466 U.S. 668 (1984). The court recognized that petitioner was "unquestionably denied his right to counsel at the preliminary hearing at which the identification was made" and that, under clearly-established law, evidence of an uncounseled pre-trial identification is subject to a *per se* exclusionary rule. *Ibid.* Applying the second prong of *Strickland*, the court reasoned that counsel's unprofessional errors, if corrected, would not have changed the result of the proceeding. *Id.* at 64a. Thus, the court concluded that petitioner's trial counsel was not constitutionally ineffective. *Ibid.* The court did not address petitioner's counsel's failure to challenge the testimony of the investigating State Trooper who testified at the preliminary hearing, but not at the subsequent trial.

stages" at which the Sixth Amendment right to counsel attaches, courts have struggled to resolve the appropriate remedy for violations of that right. This case presents a critical constitutional question that arises in many such cases and on which the courts of appeals (and at least one state supreme court) are divided. These conflicts reflect fundamental disagreements over the proper interpretation of the Sixth Amendment and this Court's constitutional decisions, resulting in one set of constitutional protections in some circuits and a different set of constitutional protections in others. Moreover, the uncertainty that these conflicts create has an enormous practical impact on prosecutors, criminal defendants, and courts throughout the Nation, because the issue arises in thousands of preliminary hearings annually across the nation.

I. Review Is Needed To Resolve A Circuit Conflict Over The Standard For Determining When A "Presumption of Prejudice" Applies To A Sixth Amendment Violation.

The Third Circuit's non-application of the *Cronic* "presumption of prejudice" to a complete denial of counsel at a critical stage widens an existing conflict between those courts of appeals that, like the Third Circuit, require an individualized showing that the critical stage is one at which the constitutional error pervades the entire criminal proceeding and those that apply a *per se* rule that denial of counsel at a critical stage warrants reversal. This Court's guidance is badly needed to resolve this important question of constitutional law, which arises frequently in both federal and state prosecutions. This Court's most recent guidance on the *Cronic* presumption of prejudice, in *Bell* v. *Cone*, 535 U.S. 685 (2002), and its opinion in *United States* v. *Gonzales-Lopez*, 126 S. Ct. 2557 (2006), have engendered further confusion among the circuit courts resulting in divergent applications of decisions from this Court.

1. The decision below deepens a square circuit conflict on this important question. On the one hand, following the earlier Fourth Circuit decision in *United States* v. *Owen*, 407 F.3d 222 (4th Cir. 2005), the court below set an extraordinarily high threshold for finding that a complete denial of counsel is a structural error that warrants automatic vacatur. In interpreting the language in *Cronic* that the first and "[m]ost obvious" situation in which a presumption of prejudice applies is a "complete denial of counsel," the court acknowledged that petitioner's argument "has some appeal." Pet. App. 58a. However, the court crafted a new and narrow usage of the phrase "critical stage" to mean only those critical stages at which a denial of counsel would necessarily undermine the entire proceeding. Pet. App. 59a.

As noted above, the court below relied on a portion of the Fourth Circuit's decision in *Owen*. Although the court in *Owen* acknowledged that the presumption of prejudice under *Cronic* applies to a "critical stage" at which the denial of counsel undermines the reliability of the proceeding, the court refused to extend the presumption to all critical stages, as that term is used in *Coleman*.[3] *Ibid.* The court recognized that Owen's arraignment was a critical stage at which the Sixth Amendment right to counsel applies--that is, a critical stage under *Coleman*—but nevertheless concluded that the arraignment was *not* a critical stage under *Cronic*. *Id.* at 228-229.

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[3] Since *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932), the Court has held that the defendant must be represented by counsel at any "a critical stage in a criminal proceeding." See also *Coleman*, 399 U.S. at 8 (holding that preliminary hearing is critical stage); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (determining that arraignment is a critical stage); *White*, 373 U.S. at 59 (holding that a preliminary hearing is a critical stage, where plea entered without counsel was introduced against defendant at trial).

The Tenth Circuit has taken a logically indistinguishable approach, concluding that a Sixth Amendment violation requires reversal only when the constitutional violation "pervades the entire proceeding." *United States* v. *Collins*, 430 F.3d 1260, 1266-67 (10th Cir. 2007). Although the court in *Collins* correctly noted that *Cronic* establishes a Sixth Amendment violation without the showing of prejudice required under *Strickland*, the court nevertheless proceeded to examine the record to determine whether the error pervaded the entire proceeding. *Id.* at 1268. After finding that the defendant was denied counsel at his competency hearing and that the error may have affected the outcome of the trial, the court vacated the conviction. *Ibid.*

The Connecticut Supreme Court has likewise bifurcated "critical stages" into those amenable to harmless error analysis and those requiring reversal. In *State* v. *Brown*, 279 Conn. 493, 510, 903 A.2d 169, 179 (2006), the Court declined to vacate a conviction where the defendant was denied counsel at his probable cause hearing and announced a new rule that vacatur is warranted only when the constitutional error "renders a trial fundamentally unfair." These courts have thus created a two-tier system of critical stages—those critical "enough" to warrant a presumption of prejudice (and vacatur) and those less critical stages, to which a harmless error test applies.

In contrast to this strained parsing of the term "critical stage," the Sixth and Eleventh Circuits have adopted a more literal and straightforward reading of *Cronic*. In *French* v. *Jones*, 332 F.3d 430, 438 (6th Cir. 2003), the court concluded that a defendant whose lawyer was not present at a critical stage of the prosecution—in this case, when the trial judge gave a supplemental instruction to a deadlocked jury—is entitled to reversal of his conviction under *Cronic* and *Bell*. The court held that "'the complete denial of counsel during a critical stage of a judicial pro-

ceeding mandates a presumption of prejudice'" and is "per se reversible error." *Id.* at 436, 438, quoting *Roe* v. *Flores-Ortega*, 528 U.S. 470, 483 (2000).

The court reaffirmed its conclusion regarding the application of *Cronic* in *Van* v. *Jones*, 475 F.3d 292, 304-305 (6th Cir. 2007). There, the court began with an extensive dissection of this Court's decision in *Cronic*, highlighting, in particular, the three circumstances that Justice Stevens identified as demanding a presumption of prejudice, including "complete denial of counsel" and denial of "the right of effective cross-examination." *Id.*, citing *Cronic*, 466 U.S. at 659-660. The court examined closely the language of the Chief Justice's majority opinion in *Bell*, which adopted a strong reading of *Cronic*, before concluding that a "complete absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error." *Id.* at 311-312; see also *United States* v. *Hillsman*, 480 F.3d 333, 335 (5th Cir. 2007) (citing *Van* v. *Jones* for its conclusion that reversal is warranted where counsel for the accused is totally absent).

Similarly, the Eleventh Circuit in *Hunter* v. *Moore*, 304 F.3d 1066, 1069-1070 (11th Cir. 2002), deemed that *Cronic* is the appropriate legal test where the defendant was denied counsel at a critical stage of a criminal prosecution. The court contrasted its application of *Cronic* for an actual denial of counsel to the two-prong *Strickland* approach for ineffective assistance of counsel claims. *Ibid.* Based on *Cronic* and *Bell*, the court held that an actual denial of counsel at a critical stage warrants reversal without a specific showing of prejudice. *Ibid*; see also *Plumlee* v. *Del Papa*, 465 F.3d 910, 923 (9th Cir. 2007) (concluding that an actual denial of counsel mandates a presumption of prejudice and vacating the conviction accordingly).

The Court's intervention is warranted to resolve this

clear and entrenched circuit conflict on this important issue. These two disparate interpretations of the Sixth Amendment right to counsel and the diverging frameworks for determining the remedy for a constitutional violation are ripe for resolution by this Court.[4] There is no need for further percolation of the issue, as the analytical framework is a binary one: denial of counsel at a critical stage either requires vacatur or it does not. There can be no "third way."

2. Not surprisingly, these conflicting interpretations of the Sixth Amendment and applicable Supreme Court decisions concerning the appropriate remedy for a Sixth Amendment violation would have produced directly conflicting results in petitioner's case depending on the circuit in which the issue arose. Application of the Sixth, Ninth, and Eleventh Circuits' *per se* rule (*i.e.*, complete denial of counsel at a critical stage requires reversal without demonstrating harm) to the facts here would have mandated vacating petitioner's conviction. Once the court found that a preliminary hearing is a "critical stage" of the prosecution, the remedy would have been vacatur of the conviction.

Under the restrictive approach of the Third, Fourth, and Tenth Circuits, and the Connecticut Supreme Court, however, a court would be forced to engage in speculation and supposition in an effort to ascertain whether the ab-

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[4] The Third Circuit's beyond-subtle distinction between "critical stages" and "critical stages" is clearly difficult for other courts to apply. For example, in *Mintun* v. *Idaho*, __ P.3d __, 2007 WL 1975624*3 (Idaho App.), the court cited the decision below for the proposition that denial of counsel during a critical stage warrants a presumption of prejudice. However, the court apparently failed to grasp that the decision below creates a two-tier system of critical stages, as the court omitted any discussion of whether a direct appeal of a conviction is a critical stage under the decision below or under *Coleman*.

sence of the "guiding hand" of counsel at a critical stage was pervasive. *Powell*, 287 U.S. at 68-69. And, at least in the Third Circuit, the answer is no, even where there was an intentional denial of counsel at an admittedly "critical stage" and the defendant was ultimately unable to cross-examine a witness that testified against him during the uncounseled preliminary hearing.

Thus, under the Sixth, Ninth, and Eleventh Circuits' application of *Cronic*, petitioner's conviction would be vacated, while petitioner's conviction stands under the Third Circuit's test—as it would in two other circuits and Connecticut—because the defendant failed to make an individualized showing of prejudice. This stark difference in outcomes based solely on the happenstance of geography and jurisdiction undermines the public's perception of fairness and equality within the criminal justice system, and calls for resolution by this Court.

3. The Third Circuit's approach also conflicts in principle with this Court's decision in *Gonzales-Lopez*. 126 S. Ct. at 2563. Although *Gonzales-Lopez* involved application of the Sixth Amendment right to "counsel of choice," the logic of the decision is applicable to petitioner's circumstances. Indeed, the complete deprivation of counsel (*i.e.*, no "choice") is a constitutional violation of a greater magnitude than the violation in *Gonzales-Lopez*. There, Justice Scalia, writing for the majority, differentiated between actual deprivation of counsel of choice and the denial of the right to effective assistance of counsel. *Id.* at 2562-2563. Where a defendant is denied his counsel of choice, the Sixth Amendment violation is complete once there is erroneous deprivation of counsel and automatic reversal is warranted. *Id.* at 2563. In contrast, where a defendant claims he was denied effective assistance of counsel, establishing a violation requires a showing of prejudice. *Id.* at 2563. Although the majority agreed with the Government that the purpose of the rights in the

Amendment is to ensure a fair trial, the Court noted that it "does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." The majority thus rejected the Government's approach in *Gonzales-Lopez* as "a line of reasoning that abstracts from the right to its purposes, and then eliminates the right." *Id.* at 2562, *citing Maryland* v. *Craig*, 497 U.S. 836, 862 (1990) (Scalia, J, dissenting).

Application of the principles of *Gonzales-Lopez* to the circuit courts' interpretation of *Cronic* and *Bell* should lead to consistent results, given that the right to counsel at a critical stage and the right to counsel of choice both implicate the same "root meaning" of the constitutional guarantee. *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). Analytically, there is little difference between complete denial of counsel in the face of a request for counsel and denial of counsel of choice—both deny the defendant an attorney of his choosing. Thus, both types of Sixth Amendment violations should be characterized as "structural errors," because they affect the very framework of the subsequent trial and because of the difficulty in disaggregating the effect of the error from the outcome of the proceeding.

Gonzales-Lopez, however, creates an inconsistency between the counsel of choice doctrine and the effective assistance of counsel doctrine as established in *Strickland* and *Cronic*. See *Supreme Court—Leading Cases*, 120 HARV. L. REV. 203, 207 (2006) (describing *Gonzales-Lopez* as an "unsatisfying effort to distinguish the ineffective assistance and counsel of choice doctrines conceptually" that creates "an obvious incongruity" in Sixth Amendment doctrines.). Under *Gonzalez-Lopez*, a criminal defendant who is erroneously denied his first-choice counsel receives a new trial, even if his second-choice attorney "performed brilliantly." *Gonzalez-Lopez*, 126 S. Ct. at 2570 (Alito, J., dissenting). Under the Third Circuit rule applied below, a

criminal defendant who is denied counsel altogether does not receive a new trial unless he can demonstrate the outcome would have been different had counsel been present. This rule sanctions criminal proceedings that are missing a key procedural ingredient--a competent defense attorney—as long as the outcome of the trial is correct (that is, the defendant is obviously guilty).[5]

The Ninth Circuit has recognized the obvious and intuitive link between denial of counsel of choice and actual denial of counsel. In *Plumlee* v. *Del Papa*, 465 F.3d 910 (9th Cir. 2007), the court, in effect, converged *Gonzales-Lopez* and the Sixth and Eleventh Circuit approach to complete denial of counsel at a critical stage. After first noting that *Gonzales-Lopez* held that denial of counsel of choice is a structural error requiring reversal, the court found that the defendant's claim was different—he was deprived *entirely* of counsel. *Id.* at 922 n.8. According to the court, this deprivation was even greater than that suffered by Gonzales-Lopez. *Ibid.* Having concluded that there was a complete denial of counsel, the court presumed prejudice and vacated the decision. *Id.* at 923.

Commentators have also recognized the tension between *Gonzales-Lopez* and the decisions of the Third, Fourth, and Tenth Circuits regarding the remedy of a Sixth Amendment violation. For example, one writer has explained that the Third Circuit's articulation of *Cronic* remains "unsettled law," particularly in light of the "deep divisions among the justices" as to when harmless error analyses are appropriate. See *Right to Counsel: Denial of*

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[5] See Richard L. Gabriel, Note, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1261, 1272–81 (1986) ("[T]he *Strickland* test emasculates the Sixth Amendment by substituting for the procedural guarantee of that amendment a substantive inquiry into the fundamental fairness of the result of the trial.").

Counsel at Critical Stage Didn't Give Rise to Presumption of Prejudice, 80 CRIM. L. REP. 620 (2007) (reporting on the conflicting logic of the Third Circuit rule and *Gonzales-Lopez*). Others have read *Gonzales-Lopez* to suggest that this Court "might take issue with the Fourth Circuit's ruling [in *Owen*]." *Right to Counsel: Reversal Not Automatic for Denial of Counsel at Probable Cause Hearing*, 79 CRIM. L. REP. 702, 703 (2006).

4. The history of the Sixth Amendment and a straightforward reading of this court's precedent clearly support the Sixth, Ninth, and Eleventh Circuits' approach. The right to counsel forms the historical core of the Assistance of Counsel Clause. See William M. Beaney, *The Right to Counsel in American Courts* 17-21 (1955) (noting that as early as 1660, Rhode Island enacted a statute guaranteeing "the lawful privilege of any man that is indicted, *to procure* an attornye to plead any poynt of law that may make for the clearing of his innocencye," and that, following the Declaration of Independence, nearly every former colony adopted provisions protecting a right to counsel.) Lessons learned under oppressive kings and colonial governors left the Framers with a keen appreciation for the need to protect criminal defendants from the power of the government. They well understood the importance having an independent voice represent a person facing the full weight and authority of the Government. Their solution was to provide not "merely that a defense shall be made for the accused," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), but that the defendant shall have the right to decide whether to defend himself through counsel and, if so, which counsel. And *this right*—as opposed to modern principles such as the right to "effective" assistance of counsel—always has been defined and enforced for its own sake, irrespective of any objectively demon-

strable prejudice arising from any particular violation.[6]

This Court's modern jurisprudence in cases such as *Cronic*, *Bell*, and *Gonzales-Lopez* confirms that the right to counsel does not depend on the defendant's ability to demonstrate a tangible adverse effect on the adversarial process. The right exists on its own terms and furthers goals above and apart from ensuring an objectively defined fair trial. To be sure, modern jurisprudence has clarified that the right to counsel is not absolute and that the general right of assistance of counsel includes a right to "effective" assistance. But neither of these developments permits courts to deny defendants the ability to be represented by counsel for no legitimate reason. Put another way, neither of these developments means that defendants who are improperly denied their requests to be represented by a counsel must demonstrate some level of prejudice to make out a constitutional violation.

The whole point of including the Assistance of Counsel Clause in the Constitution was to single out the right to counsel of choice as one of the select few rights to which defendants are entitled without having to make any specific showing of need. Saying that the right is not violated unless the defendant will suffer (or has suffered) prejudice

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[6] The right to effective assistance is an implied right, emanating from an overall purpose of the Sixth Amendment, whereas the right to counsel is the core concept protected by the Assistance of Counsel Clause. See, *e.g.*, Note, *Legislation: The Right to the Benefit of Counsel Under the Federal Constitution*, 42 Colum. L. Rev. 271, 272, 282 (1942) (concluding that "[o]ne of the *most important* aspects of the right to counsel is the opportunity to obtain counsel of one's own choice," while observing that "[t]he right to counsel has *begun* to mean the right to have effective assistance of counsel" (emphasis added)). The approach of the Third, Fourth and Tenth Circuits would collapse the historic right of counsel of choice into the modern right to effective assistance.

"is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004); see also *Strickland* v. *Washington*, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) ("The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree.").

The decision below, however, erodes the historical protections of the Sixth Amendment by ignoring the original intent of the Constitutional amendment and the unavoidable teachings of this Court's decisions. The root purpose of the right to counsel demands that defendants not face the prosecution without the assistance of counsel. As the Sixth, Ninth, and Eleventh Circuits correctly understood, there simply can be no substitution for the assistance of counsel at any critical stage of a criminal prosecution.

This case presents the Supreme Court with the opportunity to eliminate uncertainty by harmonizing two lines of cases into a consistent analytical framework that serves the original purposes of the Sixth Amendment, acknowledges the difficulty in assessing the "necessarily unquantifiable and indeterminate" effects of deprivation of counsel, and brings much-needed clarity to the jurisprudence on the remedy for Sixth Amendment violations. Definitive resolution of these issues now will ensure a meaningful right to counsel at every critical stage of a criminal proceeding in the future.

II. The Question Presented Is Of Immense Practical Importance To Prosecutors, Courts, and Criminal Defendants.

As shown above, the conflict among the lower courts on the question presented alone warrants this Court's review. The practical importance of the questions presented, how-

ever, likewise militates strongly in favor of review. Simply put, the preliminary hearing is, for most prosecutions, the first time that a defendant is thrust into the adversarial process. A complete denial of counsel at the outset of the criminal proceeding places the defendant at an extreme disadvantage and undermines the public's confidence in the final verdict. Preliminary hearings, moreover, are commonplace in federal and state courts across the country.

1. The question presented is a recurring and important one. More than thirty-five states have some form of a preliminary hearing, as does the federal government. Given the ubiquity of preliminary hearings, a uniform approach would ensure consistent application of important constitutional rights. Although some of the particulars of preliminary hearings vary among jurisdictions, the preliminary hearing is a valuable tool for the defense in most because it provides a "preview" of the government's evidence and offers a chance to cross-examine police officers (and others) and get their testimony on record. Should the government's witnesses testify differently at trial, the defense can impeach them with any prior inconsistent statements they made at the preliminary hearing. This preliminary hearing process is especially important because witnesses, including police officers, are not legally obligated to talk to defense counsel as he or she prepares for trial. Consequently, the preliminary hearing may be the only time counsel has an opportunity to hear what a witness has to say prior to trial.

In Pennsylvania alone, the government tries approximately 6,000 criminal cases per year in which defendants must participate in a preliminary hearing.[7] Many other

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[7] Administrative Office of Pennsylvania Courts, Department of Policy and Research, Dynamic Statistics, available at http://www.courts.state.pa.us/index/aopc/Research/dynamic_statistics/index_research.asp.

States, moreover, have substantively similar hearings—meaning that the question presented here has implications for tens of thousands of cases annually. The law of Wisconsin, for example, provides for transcribed preliminary hearings in which the prosecution presents witnesses and introduces evidence and the defendant may cross-examine witnesses against the defendant and call witnesses on the defendant's own behalf. WIS. STATS. § 970.03 (2005); see also CAL. PENAL CODE § 858-883 (2006) (same). Similarly, the law of Texas provides for preliminary "examinations" that permit counsel for the State and the accused to take transcribed testimony on direct and cross examination. TEX. CRIM. PROC. CODE ANN. § 16.01 (2004). These statutes are representative of the laws nationwide on the subject, and confirm the tremendous practical importance of the question presented.[8]

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[8] Other states that provide for preliminary hearings include: Alabama (ALA. CODE § 15-11-6), Arizona (ARIZ. R. CRIM. PROC. 4.2), Arkansas (ARK. CODE ANN. § 5-4-310), Colorado (COLO. REV. STAT. § 16-5-31), Connecticut (CONN. GEN. STAT. § 54-46a), Delaware (DEL. CODE Ann. 11 § 5308), Florida (FLA. CRIM. PROC. L. 907.045), Georgia (GA. CODE ANN. § 27-4), Idaho (IDAHO CODE § 19-804), Illinois (725 ILL. COMP. STAT. 5/111-2), Indiana (IND. CODE § 35-33-7-2), Iowa (IOWA R. CRIM. P. 2.2(4)), Kansas (KAN. CRIM. PROC. CODE § 22-2902), Louisiana (LA. CODE CRIM. PROC. § 230.2), Maryland (MD. CODE ANN. § 4-103), Massachusetts (123A MASS. GEN. LAWS § 12), Michigan (MICH. CRIM. PROC RULE 6.110), Mississippi (MISS. CODE ANN. § 11-38-5), Missouri (MO. REV. STAT. § 544.250), Montana (MONT. CODE. ANN. § 46-10-202), Nebraska (NEB. REV. STAT. § 29-1607), Nevada (NEV. REV. STAT. § 171.196), New Hampshire (N.H. REV. STAT. ANN. § 596-A), New York (N.Y. CRIM. PROC. LAW § 180.60), North Dakota (N.D. CENT. CODE § 29-07-01.1), Ohio (OHIO REV. CODE ANN. § 2937.11), Oklahoma (OKLA. STAT. 22 § 258), Oregon (OR. REV. STAT. § 135.07), Rhode Island (R.I. GEN. LAWS § 13-8-18.1), South Carolina (S.C. CODE ANN. § 17-23-160), South Dakota (S.D. LAWS 23A-4-3), Tennessee (TENN. CODE ANN. § 40-10-101), Utah (UTAH CODE ANN § 78-3a-603), Vermont (VT. STAT. ANN. 33 § 7-8-105), Virginia (VA. CODE ANN § 19.2-218), Washington

This Court's decisions also recognize that the right to counsel interposes a vital check on governmental abuse; respects defendants' autonomy and dignity; and ensures that criminal trials appear fair to the public. But when, as here, a court intentionally deprives a defendant of his right to counsel, any subsequent trial is necessarily tainted. Otherwise, the government could refuse to provide counsel to an indigent defendant—for example, to save money or help the prosecution—so long as an objectively "fair" trial ensued.[9] Although the government will undoubtedly suggest this never would occur because judges will act in "good faith" with respect to providing counsel, such assurances are not sufficient when it comes to liberties that the Framers enshrined in the Sixth Amendment. See *Crawford*, 541 U.S. at 67 ("The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.").

2. Practical considerations also weigh heavily in favor of rejecting the Third Circuit's re-conceptualization of the right to counsel. As an initial matter, the right to counsel performs an important institutional role: when the government unjustifiably interferes with the accused's retained counsel, the government "creates an appearance of

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(WASH. REV. CODE § 10.16.110), West Virginia (W. VA. CODE § 49-5-9), and Wyoming (WYO. STAT. ANN. § 7-8-105).

[9] Roughly eighty percent of criminal defendants in the state courts are indigent and thus require appointed counsel. *See* Caroline W. Harlow, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Defense Counsel In Criminal Cases* 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (reporting that eighty-two percent of state felony defendants in the nation's seventy-five most populous counties in 1996 and sixty-six percent of federal felony defendants in 1998 had publicly appointed counsel).

impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (plurality opinion).

The Third Circuit's approach would also dramatically shift the incentives faced by prosecutors, courts, and defendants alike. With respect to prosecutors, the effective removal of any cost to arguing against or contacting unrepresented defendants—since retrial would be required only in the rare case when the defendant could show that the subsequent trial was "unfair"—would create an incentive for overzealous prosecutors to seek to delay appointment of counsel or deny access to counsel entirely. With respect to courts, the Third Circuit's approach deprives the judges of the benefits of the adversarial process, tipping the balance of the inquiry in favor of the prosecution. The Third Circuit's rule would also deflect attention from the constitutionally-recognized interests of defendants in proceeding with the aid of counsel and toward a wholly hypothetical inquiry into whether the presence of counsel would have changed the outcome of the proceeding or otherwise harmed the defendant. And with respect to defendants, the Third Circuit's rule would create a series of perverse incentives that would force them to choose between preserving and vindicating their right to their counsel on the one hand and accepting a plea that may be otherwise in their best interest on the other.

What is more, the Third Circuit's rule would create a new and unwieldy kind of habeas litigation. Defendants seeking to vindicate their right to counsel would have no choice but to file collateral causes of action in order to prove prejudice at evidentiary hearings involving trials-within-trials. A rule requiring defendants to prove prejudice in order to establish a violation of the constitutional right to counsel would be quite difficult for trial courts to administer and extremely costly and inefficient for appel-

late courts to police. This would increase the burden on already over-stretched judicial resources.

3. Finally, a decision by this Court definitively establishing the legal standards by which remedies for Sixth Amendment violations are evaluated will very likely reduce the litigation burdens on both defendants and prosecutors alike. The Sixth Amendment is implicated in more than 25% of all habeas petitions, or more than 5000 habeas petitions per year.[10] Uncertainty in any area of the law breeds litigation. But that is particularly true in this area, which provides the baseline set of constitutional protections in both state and federal courts, and in which lower courts are deeply divided over the applicable legal framework. A definitive approach to remedying Sixth Amendment violations will allow defendants and prosecutors, at the state and federal level, more easily to predict the outcome of litigation and, for that reason, more readily to fashion compromises acceptable to both sides.

In sum, criminal defendants regularly suffer from constraints on their Sixth Amendment rights as a result of both deliberate and inadvertent denials of their right to counsel. Although the Constitution is designed to ameliorate such problems, lower courts have interpreted the remedy for such violations inconsistently, in some cases rendering important legal protections largely ineffective, while at the same time spawning unnecessary litigation over their application. Only this Court can provide consistent standards for evaluating under the U.S. Constitution the appropriate remedy for Sixth Amendment violations nationally.

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[10] See Roger A. Hanson and Henry W.K. Daley, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Federal Habeas Corpus Review*, at 8-9, 14 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 04-164-Erie

District Judge McLaughlin
Magistrate Judge Baxter

TYSON A. DITCH,
Petitioner,

v.

JAMES L. GRACE,
Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition for Writ of *Habeas Corpus* be dismissed and that a certificate of appealability be denied.

II. REPORT

This is a petition for writ of *habeas corpus* filed by

a state prisoner incarcerated at the State Correctional Institution at Huntingdon ("SCI-Huntingdon"). Petitioner is serving an aggregated sentence of 7½ to 15 years that was imposed on June 4, 1999, for his conviction of Criminal Attempt to Commit Burglary (18 Pa.C.S.A. § 901, 3502(c)(1)), Recklessly Endangering (19 Pa.C.S.A. § 2705), Person Not to Possess a Firearm (18 Pa.C.S.A. § 6105), and Criminal Mischief (18 Pa.C.S.A. § 3304). The charges arose from an incident that occurred in the early morning on February 18, 1998, when Petitioner allegedly fired ten shots from a 9mm handgun into the front door of an apartment belonging to his former girlfriend and fled the scene. The only witness who identified Petitioner as the assailant was legally blind at the time of the shooting. (*See* Petition, Exhibit A).

A. Procedural History

Petitioner's jury trial ended on or about January 22, 1999. After his sentencing on June 4, 1999, Petitioner filed a post-sentence motion for judgment of acquittal and/or a new trial, raising the following claims:

1. The evidence presented at a trial was insufficient to connect him to the crimes of which he was convicted.

2. His trial counsel was ineffective for failing to file a pretrial motion to suppress or limit the testimony of the identification witness.

3. His trial counsel was ineffective for failing to call a defense witness, Jamal Harris.

4. His trial counsel was ineffective for failing to make a motion to sever

the Persons Not to Posses Firearms charge from the other charges.

5. His trial counsel was ineffective for failing to include in his suppression motion alleged misstatements of material fact that were contained in the affidavit of probably cause for the search warrant that was used to recover a 9mm handgun from his residence.

6. His trial counsel was ineffective for failing to object to the Commonwealth's failure to present as a witnesses the police officer who completed the affidavit of probable cause for the search warrant.

7. His trail counsel was ineffective for failing to cross-examine a Commonwealth witness about his prior convictions in an attempt to diminish his credibility.

8. His trail counsel was ineffective for failing to file a motion for a new preliminary hearing.

9. His trail counsel was ineffective for declining the trial judge's offer of a corrective instruction after a Commonwealth witness testified that Petitioner was previously "on the run."

10. His trial counsel was ineffective for failing to file a motion for a new

trail immediately upon discovering at trial that the arresting officers allegedly violated the "knock and announce" rule when executing the search warrant.

11. The trial court erred in not granting a mistrial when a Commonwealth witness testified that the Petitioner was previously "in West Virginia on the run."

12. The trial court erred in not allowing the identification witness a second chance to identify Petitioner after stating from the witness stand that he did not see the alleged perpetrator in the court room.

13. The trial court erred as a matter of law when it interjected its opinions as to the facts of the case.

14. The trial court erred in failing to give cautionary instructions regarding the in-court identification of Petitioner, on the second attempt, by the identification witnesses, who was legally blind.

15. The trial court erred in denying Petitioner's motion to suppress the evidence obtained pursuant to the search warrant based on the "four corners" rule.

16. His trial was ineffective for failing to request a cautionary instruction

> regarding the in-court identification of Petitioner by the identification witness.[1]

(*See* Document #13, Respondent's Reproduced Record, Volume I, at pp. 60-71, 100). By Memorandum and Order dated December 20, 1999, the trial court determined that none of the issues raised by Petitioner in his post-sentence motions had merit, except for Petitioner's claims that his trial counsel was ineffective for failing to call Jamal Harris as a defense witness, for which an evidentiary hearing was found to be necessary. (*See* Document #13, Respondent's Reproduced Record, Volume I, at p. 133). After an evidentiary hearing was held on March 29, 2000, the trial court denied Petitioner's post-sentence motions by Memorandum Order dated April 19, 2000. (*See* Document #13, Respondent's Reproduced Record, Volume I, at pp. 134-137).

Petitioner filed a direct appeal to the Pennsylvania Superior Court on or about July 26, 2000, raising the following issues:

> 1. Whether the evidence presented by the Commonwealth at Appellant's trial was insufficient to support conviction for the crimes charged?
>
> 2. Whether trial counsel was ineffective for failing to file a pretrial motion to suppress the unduly suggestive one-on-one identification at Appellant's Preliminary Hearing in violation on his right to counsel and due process rights?

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[1] This claim was added by Petitioner in a supplemental post-sentence motion that was filed on July 1, 1999.

3. Whether trial counsel was ineffective for failing to call defense witness Jamal Harris?

4. Whether trial counsel was ineffective for failing to make a motion to sever the Persons Not to Possess Firearms from the other charges against him?

5. Whether trial counsel was ineffective for failing to file a pretrial suppression motion challenging the misstatements of material fact in the affidavit of probable cause for the search warrant?

6. Whether trial counsel was ineffective for failing to request a cautionary instruction regarding the in-court identification?

7. Whether the trial court erred in denying trial counsel's request for a mistrial when a witness testified "[w]hen he (Appellant) was in West Virginia on the run"?

8. Whether the trial court erred when it allowed witness Ronald Fry a second chance to identify Appellant and interjected its opinions as to the facts of the case?

9. Whether the trial court erred in denying Appellant's pretrial motion challenging the sufficiency of the affidavit of probable cause?

(*See* Document #16, Respondent's Reproduced Record,

Vol. IV, Document 2). On May 3, 2001, the Superior Court issues a thirty-nine page opinion affirming the trial court's judgment. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4). After Petitioner unsuccessfully filed a *pro se* petition for reconsideration en banc with the Supreme Court, Petitioner's court-appointed appellate counsel filed a tardy petition for allowance of appeal *nunc pro tunc* to the Pennsylvania Supreme Court, which was denied on September 24, 2001. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Documents 5 and 6).

On October 25, 2001, Petitioner filed a *pro se* petition for post-conviction collateral relief ("PCRA petition") raising the following claims:

1. Trial counsel was ineffective for failing to seek a new preliminary hearing.

2. Trial counsel was ineffective for failing to attack the veracity of the affidavit of probable cause for the search warrant.

3. Trial counsel was ineffective for failing to obtain an independent ballistic examination of certain ballistics evidence used against Petitioner at trial.

4. Trial counsel was ineffective for failing to impeach at trail three Commonwealth witnesses with contradictory ballistics evidence that was obtained in discovery.

5. Trial counsel was ineffective for failing to impeach the Common-

wealth's identification witness with the witness's vague initial statement regarding the identify of the perpetrator of the crimes of which Petitioner was convicted.

6. Trial counsel was ineffective for failing to object to the testimony of the Commonwealth's identification witness and appellate counsel was ineffective for failing to preserve this issue on appeal.

7. The prosecutor committed prosecutorial misconduct by knowingly and deliberately soliciting perjured testimony from police officer witness regarding the number and identify of firearms found at Petitioner's residence.

8. The prosecutor committed prosecutorial misconduct by knowingly soliciting perjured testimony from a ballistics examiner at trial.

9. The prosecutor committed prosecutorial misconduct by eliciting uncounseled preliminary hearing identification testimony from the Commonwealth's identification witness.

10. The prosecutor committed prosecutorial misconduct by knowingly soliciting perjured testimony from a records and identification expert regarding the manufacture of a

shell casing that was found at the crime scene.

11. Appellate counsel was ineffective for failing to adequately raise and present on direct appeal the following two issues: whether the affiant's statements in the affidavit of probable cause for a search warrant was contradicted by other evidence so as to undermine the finding of probable cause; and the issue of whether the trial court erred in permitting the Commonwealth's identification witness to leave the witness stand to identify Petitioner as the perpetrator of the crimes of which he was convicted.

12. Appellate counsel was ineffective for failing to file a motion for reconsideration by the Superior Court.

13. Both the trial and appellate courts committed error in overlooking exhibits attached to Petitioner's brief in support of his claims.

(*See* Document #16, Respondent's Reproduced Record, Vol. IV, Documents 7 and 9).

On October 26, 2001, the trial court appointed counsel for Petitioner's PCRA petition, and argument on the petition was held on January 31, 2002. On June 6, 2002, the trial court entered a Memorandum and Order discussing the various arguments made by Petitioner and determined that certain of the issues required an evidentiary hearing. As a result, an evidentiary hearing on Pe-

titioner's PCRA petition was held by the trial court on August 26, 2002. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 8). On December 6, 2002, Petitioner's PCRA counsel filed a memorandum in support of Petitioner's PCRA petition, in which he urged the court to reinstate Petitioner's right to Petition for Allowance of Appeal to the Pennsylvania Supreme Court Nunc Pro Tunc and not further determine the merits of the remaining issues stated in the PCRA petition. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 9 at pp. 14-15).

Based on Petitioner's December 6, 2002 memorandum, the trial court entered a Memorandum and Order, dated April 28, 2003, granting Petitioner the limited post-conviction relief of allowing him to file a Petition for Allowance of Appeal to the Supreme Court regarding the Superior Court's denial of his direct appeal. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 11 at p. 5). As a result, Petitioner filed a Petition for Allowance of Appeal Nunc Pro Tunc with the Pennsylvania Supreme court on May 28, 2003, which raised all of the issues that were presented to the Pennsylvania Superior Court on direct appeal. This petition was denied by the Supreme Court on December 30, 2003. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Documents 12 and 13).

Petitioner has filed the instant petition for writ of *habeas corpus* on July 22, 2004, presenting the identical claims he raised on direct appeal to the Pennsylvania Superior Court. [Document #2]. The Commonwealth has filed an answer to the petition [Document #18] and Petitioner has filed a response to the Commonwealth's answer. [Document #20]. The petition is now ripe for disposition.

B. Facts of the Crime

The Superior Court summarized the facts underlying petitioner's conviction as follows:

> On February 18, 1998, at approximately 2:45 a.m., Dasha Yenny, the victim and [Petitioner's] former girlfriend, reported to police that someone has shot a gun into the front door of the apartment where she, her young child, and her boyfriend, Jeffrey Barksdale, were sleeping. The police found a casing from a 9mm bullet outside the victim's apartment and believed that the bullet holes found in the victim's door were made from a gun similar to this caliber. The victim told the investigating officer that she had recently been receiving harassing telephone calls from [Petitioner] in which [Petitioner] had threatened her with physical harm. The victim also related to the officer that [Petitioner] had been arrested in the past for harassing and physically abusing her.
>
> While the officer was at the scene, [Petitioner] called the victim on the telephone. When the officer attempted to speak to [Petitioner], [Petitioner] terminated the call. A phone trace of this call determined that it had originated from the residence of [Petitioner's] brother. The victim informed the officer that [Petitioner] resided at his brother's residence. A firearms ownership inquiry determined that two 9mm handguns were registered to [Petitioner's] brother.
>
> A neighbor in an apartment near the victim's apartment reported to the investi-

gating officer that he heard the shots fired into the victim's apartment. The neighbor further reported that he subsequently saw an individual leave the area and enter a white automobile. The neighbor stated that the white automobile then left the scene.

Troopers from the Pennsylvania State Police, at approximately 3:30 a.m., drove to [Petitioner's] brother's residence, and observed a white automobile parked nearby. The troopers felt the hood of the automobile and determined it was still warm to the touch. Based upon the above information, search warrants were issued.

Later that morning, the Pennsylvania State Police executive the search warrants on the residence of [Petitioner's] brother. During the course of the search, the police found [Petitioner] sleeping in the attic of the residence. [Petitioner] was the only occupant of the residence at the time of the search. Approximately fifteen (15) feet away from [Petitioner], a 9mm Ruger pistol was found under some clothing. The Pennsylvania State Police Laboratory analyzed the 9mm Ruger pistol and determined that it holds ten rounds of ammunition, and that the fragments from at least one of the bullets found at the crime scene were fired from this pistol. In addition, laboratory analysis also determined that the one spent shell casing found at the scene was fired from that same gun.

See Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at pp. 1-3. (citations to trial court opinion omitted).

C. Exhaustion

The first issue in any habeas corpus proceeding instituted by a state prisoner is whether the petitioner has exhausted his state court remedies. Exhaustion requires that the claims presented in the federal court have been presented in substantially the same form to the state's highest court, with identity of both facts and legal theory. *Bond v. Fulcomer*, 864 F.2d 306 (3d Cir. 1989). Even if the claims have been so presented to the state's highest court, "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c); *Castille v. Peoples*, 489 U.S. 346 (1989). And, although the requirement is not jurisdictional, it "should be strictly adhered to because it expresses respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions." *Landano v. Rafferty*, 897 F.2d 661, 669 (1990). The requirement also recognizes the duty, and ability, of the state courts to uphold federal law, and serves the interest of ensuring a fully developed record in the state court. *Id.* "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Each of petitioner's claims has been presented to the state courts at all levels, including on appeal to the Superior Court and to the Supreme Court of Pennsylvania. State court remedies have, therefore, been exhausted.

D. Standard of Review

"Under 28 U.S.C. § 2254(d), a federal court may grant habeas relief only if the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Superior Court of the United States,' *id.* § 2254(d)(1), or was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' *id.* § 2254(d)(2). [footnote omitted]. Moreover, a state court's factual findings are 'presumed to be correct,' and the habeas petitioner carries the 'burden of rebutting the presumption of correctness by clear and convincing evidence.' 28 U.S.C. § 2254(e)(1)." *Chadwick v. Janecka*, 312 F.3d 597, 606-07 (3d Cir. 2002). In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor, writing the opinion of the Court in Part II, discussed the independent meanings of the "contrary to" and "unreasonable application" clauses contained within section 2254(d)(1).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonable applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 411-13.

The Supreme Court further clarified that a federal

habeas court making the unreasonable application inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. *Id.* at 409. "Under § 2254(d)(1)'s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. These standards apply also to mixed questions of fact and law, such as whether trial counsel provided effective assistance of counsel. *Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 1621 (2001).

E. Merits

1. Ineffective Assistance of Counsel

In this case, five of the nine issues raised by Petitioner require this Court to determine if the state court's decision is an unreasonable application of the standard applicable to claims of ineffective assistance of counsel. The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (*quoting Strickland v. Washington*, 466 U.S. 668, 684 (1984)).

> Thus the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Fretwell, 506 U.S. at 369 (*citing United States v. Cronic*, 466 U.S. 648, 658 (1984)). *See also Kimmelman v. Morri-*

son, 477 U.S. 365, 374 (1986) (the essence of a claim alleging ineffective assistance is whether counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect).

The Supreme Court has formulated a two-part test for determining whether counsel rendered constitutionally ineffective assistance: 1) counsel's performance was unreasonable; and 2) counsel's unreasonable performance actually prejudiced the defense. *Strickland*, 466 U.S. at 687. To determine whether counsel performed below the level expected from a reasonable competent attorney, it is necessary to judge counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. *Strickland*, 466 U.S. at 690. A petitioner who claims that he or she was denied effective assistance of counsel carries the burden of proof. *Cronic*, 466 U.S. at 658.

The first prong of the *Strickland* test requires a defendant to establish that his attorney's representation fell below an objective standard of reasonableness by committing errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 688. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the totality of the circumstances, the challenged action "might be considered sound trial strategy." *Id.* at 689. The question is not whether the defense was free from errors of judgment, but whether counsel exercised the customary skill and knowledge that normally prevailed at the time and place. *Id.*

The second prong requires a defendant to demonstrate that counsel's errors deprived him a fair trial and

the result was unfair or unreliable. *Strickland*, 466 U.S. at 689. To prove prejudice, a defendant must show that there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694 (emphasis added). A "reasonable probability" is one that is sufficient to undermine confidence in the outcome. *Id.*

In this case, the state court properly identified the standards governing claims of constitutionally ineffective assistance, so that the decision of the state court is not "contrary to" federal law.[2] Whether the state court applied the ineffective assistance standard in an "objectively unreasonable fashion" must now be addressed.

a. Failure to File Pretrial Motion to Suppress In-Court Identification

Petitioner's first ineffectiveness claim challenges his trial counsel's failure to file a pretrial motion to suppress the in-court identification of Petitioner by the Commonwealth's identification witness because the witness's pretrial identification of Petitioner was "impermissibly suggestive." In particular, Petitioner argues that the identification of Petitioner at his preliminary hearing was "unduly suggestive" because he was led into the hearing wearing handcuffs. Petitioner argues further that, due to the alleged taint of the pretrial identification, the subsequent in-court identification violated Petitioner's due process rights.

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[2] The standards utilized by the Superior Court were actually based upon two prior Superior Court decisions, *Commonwealth v. Randall*, 758 A.2d 669 (Pa.Supper. 2000) and *Commonwealth v. Howard*, 749 A.2d 941 (Pa.Supper. 2000), which set forth principles to be followed in analyzing ineffectiveness claims that are substantially similar to those pronounced by the United States Supreme Court in *Strickland*.

The trial court concluded that there was no merit to Petitioner's claim because there was an independent basis for the in-court identification. In particular, the trial court found as follows:

> At trial [the identification witness] testified that he looked out of the picture window of his apartment, which was next door to the apartment where the shooting occurred, and observed the [Petitioner], at a distance of approximately 15 feet and under well-lit conditions, walk from the apartment building, stop, turn and look around before he left the scene. Under the totality of the circumstances, we are satisfied that there existed a sufficiently independent origin for [the witness's] in-court identification of [Petitioner].... As such, even if the identification of the [Petitioner] at his preliminary hearing could be deemed suggestive, an independent basis existed for [the witness's] in-court identification of the [Petitioner]. Therefore, even had trial counsel made a motion to suppress the identification, it would have been denied.

See Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at pp. 11-12. (citations to the trial court opinion omitted).

Upon review of the record, the Superior Court affirmed the trial court's conclusion that Petitioner's trial counsel was not ineffective for failing to file a motion to suppress the in-court identification because there was an independent basis for it. This was a reasonable application of the ineffective assistance standard based upon a correct statement of the law under federal constitutional

principles. *See Commonwealth v. Glover*, 488 Pa. 459, 468, 412 A.2d. 855, 860 (1980)(quoting *United States v. Wade*, 388 U.S. 218, 241 (1967)("[a]n in-court identification following an illegal out-of-court identification is admissible into evidence if, considering the totality of circumstances, it is determined that the in-court identification had an independent origin 'sufficiently distinguishable to be purged of the primary taint'"). Thus, the state courts' determination in this regard did not result in a decision that is "contrary to," or an "unreasonable application of," clearly established federal law that would justify habeas relief on this claim.

b. Failure to Call Defense Witness Jamal Harris

Petitioner's second ineffectiveness claim is that his trial counsel was ineffective for failing to call Jamal Harris ("Harris") as a defense witness because, according to Petitioner, Harris's testimony would have proven that Petitioner did not have access to the white vehicle that police believed to have been used as the get-away vehicle. Petitioner must show that his trial counsel was deficient for not calling Harris as a defense witness, and that but for that deficiency, the outcome of Petitioner's trial would have been different. *Strickland*, 466 U.S. at 687.[3]

Harris testified at a post-sentence evidentiary hearing on Petitioner's claim, which was summarized by the trial court as follows:

> At the time of the evidentiary hearing, Jamal Harris testified that on the evening of February 17, 1998, he was at the residence of [Petitioner's brother] at 416 Fairmont Avenue. He said he was watching television and drinking a couple of beers and that the [Petitioner] was also present at the residence.
>
> Mr. Harris testified that he and Kevin Thompson arrived at that Fairmont Avenue residence at approximately 6:00 p.m., on February 17, 1998, and that they got there in a white Buick LeSabre, which was owned by Kevin Thompson.

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[3] Counsel's failure to call or bypass a particular witness is a non-fundamental decision reserved to counsel's professional judgment. *United States v. Long*, 674 F.2d 848, 855 (11th Cir. 1982); *United States v. Gallego*, 944 F. Supp. 309, 319 (S.D.N.Y. 1996).

> Mr. Harris further testified that he left the . . . residence at approximately 12:30 a.m., to 1:00 a.m., on February 17, 1998, and that Kevin Thompson apparently had already left that residence. Mr. Harris testified that the white Buick LeSabre was left for him to drive, but that it would not start because the ignition was bad and [Petitioner's brother], therefore, took Mr. Harris home.
>
> Mr. Harris further testified that he had one set of keys to that vehicle and he did not give them to [Petitioner] and that further, [Petitioner] was not a good driver and Kevin Thompson would not have allowed him to drive the car.
>
> Mr. Harris testified that he either didn't talk to the [Petitioner's] trial counsel or if he did, he was only asked a couple of questions by that attorney.

See Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 14.

Petitioner's trial counsel also provided testimony at the post-sentence hearing, which was summarized by the trial court, in relevant part, as follows:

> ... the attorney testified that when he talked to Jamal Harris, he decided not to call Mr. Harris because he could not substantiate that the car was there after approximately a couple of hours prior to the incident.... Specifically, Mr. Harris could not testify that the car was at the Fairmont Avenue address *after* 1:00 a.m.

> [Petitioner's trial counsel] indicated that he had no recollection of Jamal Harris telling him that the car would not start nor that [Petitioner] was not permitted to drive the car and if that information had been brought to his attention, he may well have called Jamal Harris to testify.

See Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 15.

In light of the foregoing testimony, the trial court concluded that Petitioner's trial counsel was not ineffective for failing to call Harris as a defense witness. Specifically, the trial court found that:

> Based on the testimony we have heard, it was very reasonable for trial counsel for the [Petitioner] to pursue the defense that he pursued and likewise, reasonable, based on the information that he recalls and testified to, not to call Mr. Harris since the only thing he had to offer from trial counsel's recollection was that the car in question was in the driveway at Fairmont Avenue at approximately 1:00 a.m., or about an hour and forty minutes prior to the incident for which the [Petitioner] was convicted. We cannot find that counsel was ineffective.

See Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 17.

On appeal, the Superior Court agreed with the trial court's conclusion that Petitioner failed to prove his trial counsel was ineffective for not calling Harris as a defense witness because he "failed to demonstrate: (1) that trial counsel's strategy not to call Mr. Harris as a

witness was unreasonable in light of the information available to counsel at the time of trial; and (2) that [Petitioner] was prejudiced by the absence of Mr. Harris's testimony." (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 17). This conclusion was based on a correct application of the *Strickland* standards and, thus, was not "contrary to," or an "unreasonable application of," clearly established federal law that would justify habeas relief on this claim.

c. Failure to Make a Motion to Sever the "Persons Not to Possess Firearms" Charge From the Other Charges

Petitioner contends that his trial counsel was ineffective for failing to file a motion to sever the "Person's Not to Possess Firearms" charge ("Firearms charge") from the rest of the charges against him. In particular, Petitioner claims that he was prejudiced by the failure to sever the Firearms charge because the jury was made aware of his prior violent criminal history during the jury instructions on the elements of this charge.

Upon consideration of this claim, the Superior Court found that "[s]ince the Commonwealth did not demonstrate that [evidence of prior crimes] would be otherwise admissible as to the other charges ..., the trial court, upon receiving a motion for severance of the [Firearms charge], would have been obliged to grant said motion. Accordingly, we conclude that [Petitioner's] claim that trial counsel should have filed a motion for severance of the [Firearms charge] has merit." The Superior Court concluded further that "trial counsel possessed no reasonable strategic basis in failing to file a motion to sever the [Firearms charge]." As a result, the Superior Court turned to the question of whether trial counsel's error caused Petitioner prejudice, such that a reasonable prob-

ability exists that, "but for" counsel's error, the outcome of the proceeding would have been different. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at pp. 20-21).

After reviewing the "overwhelming evidence" that was presented at trial, the Superior Court concluded that Petitioner failed to establish that he suffered prejudice as a result of trial counsel's error, because the result would not have been different "but for" the error. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 21-22). This conclusion was based on a correct application of the *Strickland* standards and, thus, was not "contrary to," or an "unreasonable application of," clearly established federal law that would justify habeas relief on this claim.

d. Failure to File Pretrial Motion Challenging "Misstatements of Material Fact in the Affidavit of Probable Cause for the Search Warrant"

Petitioner alleges that the affidavit of probable cause contained the following misstatements and/or omissions of material fact: (i) withheld the fact that the identification witness was legally blind; (ii) erroneously stated that Petitioner had threatened the victim and the victim's boyfriend; (iii) misrepresented the investigation of the alleged white get-away car; and (iv) embellished the identification witness's account of the movements of the white car. (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 22.) Petitioner contends that, but for these alleged misstatements and/or omissions, there was insufficient probable cause to support the search warrants that were used to obtain the 9mm handgun and shell casing that were introduced as evidence at trial. As a result, Petitioner claims that his

trial counsel was ineffective for failing to file a pretrial motion challenging the alleged misstatements and/or omissions.

i. Identification Witness's Vision Impairment

With respect to the first alleged omission, the trial court concluded that "[t]here has been no evidence offered by the [Petitioner] that the [affiant] was aware that [the identification witness] was legally blind, that he knew of this and deliberately withheld this fact or that [the identification witness's] vision impairment rendered it an impossibility for him to have made the observations he related to the [affiant]." (*See* Document #13, Respondent's Reproduced Record, Vol. I, at p. 61). Moreover, the trial court noted that "the disclosure of [the identification witness's vision impairment], had the affiant been actually aware of [the impairment] at the time the warrant was requested, would have merely affected the weight which district justice may have afforded [the witness's] statements." (*See* Document #13, Respondent's Reproduced Record, Vol. I, at p. 61). The Superior Court affirmed the trial court's conclusion in this regard, finding that it was supported by the record. (*See* Document #16, Respondent's Reproduced Record, Vol. IV., Document 4 at p. 24). After reviewing the record, this Court finds that the State court's conclusion in this regard was based on a reasonable determination of the facts in light of the evidence presented in the State court proceeding. *See Chadwick*, 312 F.3d at 606-07.

ii. Petitioner's Threats Toward Victim

With regard to the second alleged "misstatement" that the victim told the affiant that Petitioner had threatened her, the Superior Court reviewed the record and found that the affidavit was supported by certain evidence that was presented at trial. In particular, the Superior Court noted that: the victim testified that Petitioner had made a number of harassing telephone calls to

her apartment on the night of the incident; the victim's boyfriend testified that, in the past, Petitioner had physically threatened both the victim and him; and telephone tracing evidence confirmed that telephone calls made to the victims' apartment shortly after the incident originated from the residence of Petitioner's brother. As a result, the Superior Court concluded that, although the victim testified at trial that Petitioner did not physically threaten her on the night of the incident, Petitioner had "failed to demonstrate that [the] affidavit included misstatements of what the victim told [the affiant] the night of the incident, or alternatively that any possible error in documenting what the victim told him was deliberate." (*See* Document #16, Respondent's Reproduced Record, Vol. IV., Document 4 at p. 24). Here, Petitioner has failed to meet his burden of rebutting the presumption of correctness in the State court's findings by clear and convincing evidence. *See Chadwick*, 312 F.3d at 606-07.

iii. Investigation of White Getaway Car

The third alleged "misstatement" raised by Petitioner concerns the affidavit's details of the investigation of the white "getaway" vehicle. The Superior Court recounted Petitioner's argument in this regard, in its entirety, as follows:

> Trial testimony reveals that the white vehicle was inspected by Corporal Dumbleton prior to 3:30 a.m., contrary to the fact that he left the scene and went on to investigate a separate case at 3:30 a.m. .... This search is suspicious considering the fact that the only source of the information regarding a white car was not interviewed until 3:35 a.m.... Evidence that the hood of the white car was 'warm to the

> touch' is tainted by the omission of this contradiction in the affidavit.

See Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 25, quoting Petitioner's appellate brief at pp. 23-24.

The Superior Court then noted that Petitioner provided a "cryptic reference to the 'suspicious' timeline of the investigation of the white car, but fails to develop any argument explaining how the assertions described above were deliberate misstatements of a material fact or how these statements prejudiced him." (*See* Document #16, Respondent's Reproduced Record, Vol. IV., Document 4 at p. 25). As a result, the Superior Court concluded that it was unable to review this claim because the issue was not adequately raised and developed and was, therefore, waived by Petitioner.

Since the Superior Court did not reach the merits of the issue regarding the investigation of the white car, this Court must review this issue using an "independent judgment" standard. *Hameen v. State of Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) ("[U]nder the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only 'with respect to any claim that was adjudicated on the merits in state court proceedings.' Hence, we exercise pre-AEDPA independent judgment ....").

To better comprehend Petitioner's argument, it is necessary to review the portion of the affidavit of probable cause he is challenging. The investigating officer's narrative regarding the incident indicates that he interviewed the victim's neighbor at 3:35 a.m. on the night of the incident, at which time the neighbor noted seeing a single man leaving the scene in a "white mid-sized to large car." (*See* Petition, Exhibit A). However, the affi-

davit of probable cause notes that five minutes earlier, at approximately 3:30 a.m. on the night of the incident, Corporal Dumbleton drove by the residence of Petitioner's brother and located a white 1987 Buick automobile registered to Kevin Thompson, which "match[ed] the description of the white vehicle observed leaving the area of the victims [sic] apartment at the time of this incident" and "discovered that the engine of the vehicle was still warm..." (*See* Petition, Exhibit B at ¶ 8). Petitioner argues that, because the police were not given a description of a "white car" being present at the scene of the incident until 3:35 a.m., "it was merely impossible for the police to be searching for a white mid-sized to large white vehicle at 3:30 a.m..." (*See* attachment to Petition at p. 11, 13). This inconsistency in the investigation time line is further supported by the testimony that was elicited at trial from two of the police officers who were involved in the investigation. In particular, Corporal Dumbleton confirmed during his testimony that the search for the white vehicle that was allegedly involved in the incident was conducted before 3:35 a.m.:

> A. The Meadville P.D. called and said that they had — they called the barracks and the barracks transferred the information that they had located a vehicle that we were looking for.
>
> Q. What were you looking for?
>
> A. A white vehicle possible a Buick.
>
> Q. Okay. Did you go to a certain location as a result of your conversation with the Meadville City Police?
>
> A. Yes, we met with them approxi-

mately a block away from where the vehicle was located?

* * *

Q. Did you notice — did you do anything — touch the car to determine what it's condition was?

A. Yes. As I approached the front door, I had to go by the vehicle. And as I approached the door, the other Troopers and the Meadville P.D. surrounded the house. As I approached the door, I touched the vehicle to see if the engine compartment was warm. It was warm, not hot but it was warm.

Q. What did that tell you?

A. That it was driven recently.

Q. And what time was it, sir?

A. Approximately, 3:15, 3:30, somewhere in there.

Q. What time did you leave the area?

A. Approximately, 3:30.

See Document #14, Respondent's Reproduced Record, Vol. II, at pp. 184-187.

Conversely, Trooper Raymond Collins, who served the search warrant that was obtained with the affidavit of probable cause, testified on cross examination as follows:

Q. You would agree the information that was acted upon regarding the white car came from [the victim's

neighbor] ..., correct?

A. That's correct.

Q. And he was interviewed at 3:35, correct?

A. Correct.

Q. Then the information that was acted upon would have been acted upon after 3:35?

A. Correct.

Q. Do you have an explanation as to why literally every officer who testified here puts their activities before 3:30 regarding the white car?

A. No, I have no explanation.

See Document #14, Respondent's Reproduced Record, Vol. II, at p. 219.

Based on the foregoing, Petitioner's argument regarding the discrepancy in the timing of the investigation of the "white car" has some facial appeal; however, Petitioner has failed to demonstrate how this apparent discrepancy prejudiced him. Even if one removed the paragraph regarding the investigation of the "white car" from the affidavit of probable cause, there was still sufficient probable cause established by the remainder of the affidavit to justify the issuance of a search warrant.

Moreover, Petitioner fails in his attempt to infer from the timing discrepancy that Corporal Dumbleton probably felt the "warm" hood of a white mid-sized vehicle that belonged to Petitioner's stepfather, Robert Harris, who lived across the street from Petitioner's brother. (*See* attachment to Petition at p. 12, ¶¶ 15, 17). Not only is this inference illogical, it is completely contrary to the

evidence in this case. Robert Harris testified at the evidentiary hearing regarding Petitioner's PCRA petition that he drove a white 1988 Oldsmobile Toronado. (*See* Document #15, respondent's Reproduced Record, Vol. III, at p.50). Corporal Dumbleton testified at trial that the white car he located and found to be "still warm to the touch" was a Buick. (*See* Document #14, Respondent's Reproduced Record, Vol. II., at pp. 187-88). The license plate of the Buick was found to be registered in the name of Kevin Thompson. Corporal Dumbleton testified that he checked the residence of Petitioner's stepfather at approximately 3:30 and tried to "arise" him, but received no response there. (*See* Document #14, Respondent's Reproduced Record, Vol. II, at pp. 188-89). Based on this record, there is no support for Petitioner's contention that the affidavit of probable cause implicated the wrong vehicle and was, thus, "untrue and misleading." (*See* attachment to Petition at p. 12, ¶ 23).

iv. Embellishment of White Car's Movements

Petitioner argues that the affidavit's statement that the victim's neighbor saw a white car "flee the area" was an embellishment of the witness's actual statement that "the car went to the top of the complex and I don't know which way it went." (*See* attachment to Petition at p. 12, ¶¶ 18-19). In discussing this argument, the Superior Court concluded that "[w]e cannot agree with [Petitioner's] assertion that the use of the word 'flee' substantially changes the nature of [the witness's] description of [Petitioner's] departure from the scene of the crime,.... [Petitioner] has failed to demonstrate the policeman's use of the word 'flee' was a deliberate attempt to misstate [the witness's] account of what he witnessed on the night of the incident." (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p.26). This con-

clusion is based upon a reasonable determination of the facts in light of the evidence presented in the State court proceeding, and Petitioner has failed to meet his burden of rebutting this conclusion by clear and convincing evidence. *See Chadwick*, 312 F.3d at 606-07.

After considering all of the foregoing discrepancies alleged by Petitioner, the trial court found that "[e]ven if we were to consider each one of them as true, we are compelled to the finding that none of them, individually or in the aggregate, constitute [sic] a misstatement of material fact. That is, even considering the affidavit in question absent the statements which the [Petitioner] takes issue with, probable cause to issue the warrant would still be found." (*See* Document #14, Respondent's Reproduced Record, Vol. I, at p. 61). As a result, the trial court ultimately concluded that since it found no misstatements in the affidavit of probable cause which were either material or deliberate, there was no merit to Petitioner's contention that his trial counsel was ineffective for failing to challenge the alleged misstatements. (*See* Document #13, Respondent's Reproduced Record, Vol. I, at pp. 61-62). This decision was neither contrary to, nor an unreasonable application of, clearly established Federal law, as determined by the Supreme Court in *Strickland*, so as to justify habeas relief on this claim.

e. <u>Failure to Request Cautionary Instruction Regarding In-Court Identification</u>

Petitioner argues that, since the Commonwealth's identification witness was registered legally blind, the accuracy of his identification was suspect and, thus, Petitioner's trial counsel was ineffective for failing to request an instruction advising the jury that the identification

witness's testimony must be received with caution.[4] In addressing this argument, the trial court determined that such an instruction was unnecessary with regard to the in-court identification of Petitioner:

> [The witness's] identification of the [Petitioner] was positive and unqualified. There have been no instances pointed to by the [Petitioner] w[h]ere [the witness] has offered anything less. The [Petitioner] argues, however, that because [the witness] originally observed the [Petitioner] approximately 15 feet away on the evening in question and was not able to positively identify him [at trial] until he left the stand and approached [Petitioner], that this is evidence of record that [the witness] was not in a position to clearly observe the [Petitioner]. We disagree.
>
> [The witness] testified that his eyes were highly sensitive to the type of lights in the courtroom. As such, it was necessary for him to step down from the stand to positively identify the [Petitioner]. The lighting conditions in the courtroom were such

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[4] Petitioner bases this argument on the Pennsylvania Superior Court's decision in *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A.2d 820 (1954), which held that a jury must be charged that an eyewitness's identification should be viewed with caution where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past. However, identification testimony need not be received with caution where it is positive, unshaken, and not weakened by a proper failure to identify. *Kloiber*, 378 Pa. at 424, 106 A.2d at 826.

> that [the witness] was required to approach the [Petitioner] in order to properly identify him that it must follow that [the witness] was not in a position to clearly identify the [Petitioner] on the night in question or that his opportunity for observation was not good, is an assertion without merit.
>
> The identification of the [Petitioner] by [the witness] was never in doubt even following cross-examination. Any questions pertaining to the reliability of [the witness's] identification because of his vision deficiency only affected the weight which the jury may have been afforded his testimony. Therefore, a *Kloiber* instruction was inapplicable and would not have been given even had one been requested. Hence, the [Petitioner's] claim fails.

See Document #13, Respondent's Reproduced Record, Vol. I, at pp. 67-68.

On appeal, the Superior Court agreed with the trial court's conclusion in this regard, finding that "[Petitioner's] trial counsel cannot be found ineffective for failing to raise a meritless issue." (*See* Respondent's Reproduced Record, Vol. IV, Document 4 at p. 28). This decision was neither contrary to, nor an unreasonable application of, clearly established Federal law, as determined by the Supreme Court in *Strickland*, so as to justify habeas relief on this claim.

2. Sufficiency of Evidence

Petitioner argues that the Commonwealth presented insufficient evidence to support his conviction of Attempted Burglary, claiming that he "was never seen

committing any crime, nor was he ever seen possessing a handgun," and that "[n]o testimony or evidence was presented to establish an intent to commit a theft, or any other crime once inside the apartment." (*See* attachment to Petition at p. 1, ¶¶ 1, 5). As a result, Petitioner claims his conviction violated his due process rights.

Where a petitioner challenges his incarceration on the ground that the evidence was insufficient to support his conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this standard, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. *Accord Moore v. Deputy Commissioner(s) of SCI-Huntington*, 946 F.2d 236, 243 (3d Cir. 1991), *cert. denied*, 503 U.S. 949 (1992). A federal court must apply this standard "'with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Orban*, 123 F.3d at 731 (quoting *Jackson*, 443 U.S. at 324 n. 16). The finder of fact, however, weighs the evidence and the federal courts must defer to its resolution of conflicts in the evidence. *Jackson*, 443 U.S. at 326.

The test for sufficiency of evidence is the same under both Pennsylvania and federal law. *See Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227, 1233 (3d Cir. 1992), *cert. denied*, 506 U.S. 1089 (1993); *Commonwealth v. Bricker*, 525 Pa. 362, 581 A.2d 147 (1990) (an appellate court must determine whether the evidence, and all reasonable inferences deducible there-

from, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offenses charged).

Applying essentially the same standard, the Superior Court reviewed the evidence presented at trial in the light most favorable to the prosecution and concluded that there was "sufficient evidence to enable the factfinder to find [Petitioner] guilty beyond a reasonable doubt of Attempt to Commit Burglary. The evidence was sufficient to demonstrate that [Petitioner] took a substantial step in gaining entry to an occupied structure and had the requisite intent to commit a crime, such as assault, particularly in light of the surrounding circumstances of prior continued harassment."[5] (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 8-9). Since this decision was neither contrary to, nor an unreasonable application of, clearly established Federal law, as determined by the Supreme Court in *Jackson*, there is no basis upon which habeas relief may be granted on this claim.

3. Trial Court's Denial of Request for Mistrial

Petitioner claims that the trial court erred in denying his trial counsel's request for a mistrial after a Commonwealth witness testified that Petitioner was previously "in West Virginia on the run." (*See* attachment to Petition at p. 16, ¶ 1). Petitioner claims that this testimony was unduly prejudicial because it implied to the

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[5] The Superior Court set forth its standard of review as follows: "[t]he standard we apply in reviewing the sufficiency of evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt." (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 5).

jury that Petitioner was involved in prior criminal activity. (*See* attachment to Petition at p. 16, ¶ 2). The testimony at issue was elicited from the victim's boyfriend on cross-examination regarding the numerous harassing and threatening phone calls he claimed to have received from Petitioner. In particular, the witness testified as follows:

> Q. Well, what I asked, how long prior to the incident did those —
>
> A. Every time he called.
>
> Q. He said the same thing every time he called?
>
> A. Not every time but every day, I got the same threat, basically because —
>
> Q. For how long?
>
> A. As soon as he knew I was dating her. I don't really know.
>
> Q. By phone?
>
> A. Two or three —
>
> Q. Every two or three days?
>
> A. When he was in Meadville. When he was in West Virginia on the run, I was ...

See Document #14, Respondent's Reproduced Record, Vol. II, at p. 67.

Immediately after the above testimony was offered, Petitioner's trial counsel approached the bench at sidebar and requested a mistrial. The request was denied; however, the trial court did offer to give the jury a cautionary instruction regarding the comment at issue, which Petitioner's trial counsel declined. In evaluating

whether a mistrial should have been granted as a result of the jury's exposure to the above testimony, the trial court found as follows:

> In the matter at hand, the witness' answer was in response to trial counsel's question and was a mere passing reference to what might conceivably have been construed to implicate prior criminal conduct. It was not offered with any apparent motive on the part of the witness to prejudice the [Petitioner] and was a fair answer to trial counsel's question. The prosecution did not take advantage of the witness' statement. With only a passing reference to the [Petitioner] having been "on the run" and without anything more, the [Petitioner] suffered no prejudice and the denial of the motion for a mistrial was proper.

See Document #13, Respondent's Reproduced Record, Vol. I, at pp. 68-69.

On appeal the Superior Court agreed with the trial court's finding in this regard and concluded that the witness's "challenged testimony, when viewed in context, was merely a passing reference unprovoked by the Commonwealth, and did not work to prejudice [Petitioner]." (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 32).

The United States Supreme Court has held that "a trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." *Illinois v. Somerville*, 410 U.S. 458, 464

(1973). Conversely, therefore, a trial judge properly exercises his discretion in denying a mistrial if he determines that an impartial verdict can be reached and would not have to be reversed on appeal due to an obvious procedural error at trial. Here, the trial court determined that the witness's statement at issue was merely a passing reference that was not prejudicial to Petitioner and, thus, a mistrial was not warranted. This finding is neither contrary to, or an unreasonable application of, clearly established Federal law, so as to justify habeas relief on this claim.

4. Trial Court's Allowance of a Second Chance to Identify Petitioner

Petitioner claims that the trial court erred in allowing the Commonwealth's identification witness a second chance to identify Petitioner at trial, and in "interject[ing] its opinions as to the facts of the case." (*See* attachment to Petition at p. 17). In particular, Petitioner argues that he was prejudiced when the trial court allowed the identification witness to leave the witness stand and approach Petitioner, after he had stated from the witness stand that he was not able to see the person in the courtroom who he identified on the night of the incident. (*See* attachment to Petition at pp. 17-18, ¶ 1-2). Petitioner contends that "this second chance at an in-court identification was unduly suggestive because it was a one-on-one confrontation with the person sitting next to defense counsel" and "conducive to irreparable mistaken identification." (*See* attachment to Petition at p. 18, ¶¶ 5, 7).

Petitioner contends further that the trial judge's remarks in the presence of the jury as to why he permitted the witness to leave the witness stand to make his in-court identification effectively "usurped the power and role of the jury as factfinder in the case." (*See* attachment

to Petition at p. 20, ¶ 25). Specifically, Petitioner notes that the trial judge stated that "[i]t was obvious from the witness stand that [the witness] couldn't see anybody out in the courtroom," and went on to state "I watched him look around and he just couldn't see anybody, ... it was obvious to me he was struggling, and therefore, we're giving him some latitude to make sure that if he can identify the person who was there, he has an opportunity to do that in light of his sight problems." (*See* attachment to Petition at p. 20, ¶ 24).

Habeas is only an appropriate remedy if the admission of evidence at a state court trial rises to the level of a constitutional violation. *Estelle v. McGuire*, 502 U.S. 62 (1991). Evidentiary rulings "are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Bisaccia v. Attorney General*, 623 F.2d 307, 312 (3d Cir. 1980). The Supreme Court has acknowledged its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *see also Lesko v. Owens*, 881 F.2d 44, 51-52 (3d Cir. 1989). Therefore, unless the evidence in question played a critical factor in the proceeding such that the petitioner was denied fundamental fairness at his trial, evidentiary rulings are not cognizable on habeas corpus. *Nettles v. Wainwright*, 677 F.2d 410, 414-15 (5th Cir. 1982); *Brown v. Tard*, 552 F.Supp. 1341 (D.N.J. 1982). Consequently, the appropriate inquiry is whether the claimed error of law is a fundamental defect which inherently results in a complete miscarriage of justice or in an omission inconsistent with the rudimentary demands of fair procedure. *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1990).

"'While identification testimony is significant evi-

dence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart [of] the 'integrity' of the adversary process. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.'" *Manson v. Brathwaite*, 432 U.S. 98, 113 n.14 (1977) (quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (1968), *cert. denied*, 394 U.S. 964 (1969).

Here, the trial court found that the identification of the Petitioner "had a basis independent of his in-court identification. As such, no danger of misidentification was present by virtue of the [Petitioner's] seating position at trial. ... [The identification witness] did not state that he could not identify the [Petitioner], simply that he could not see him to identify him from the witness stand because of the lights in the courtroom and his sensitivity to these lights. He was permitted to put himself in a position whereby he could see the [Petitioner] at which point he then positively identified the [Petitioner]. There was no prejudice to the [Petitioner] from this identification and, therefore, no error." (*See* Document #13, Respondent's Reproduced Record, Vol. I, at p. 69).

Petitioner has failed to demonstrate that this in-court identification was a "fundamental defect which inherently resulted in a complete miscarriage of justice or in an omission inconsistent with the rudimentary demands of fair procedure." Thus, Petitioner's claim in this regard is not cognizable in habeas corpus.

With regard to the trial judge's remarks regarding the identification witness's vision impairment, the trial court found as follows:

> The matter and the extent of the vision deficiency of [the identification witness] was an issue which adversely affected this witness and the reliability that the jury would credit his identification of the [Petitioner]. As such, if anything, the statements which explained them would have advanced the [Petitioner's] case. In fact, the [Petitioner] has consistently and repeatedly raised issue after issue regarding the vision deficiency of [the identification witness]. We cannot conceive how he can now complain that he was prejudiced by the statements complained of. This assertion of error has a hollow ring about it. The [Petitioner] has failed to state how he could possibly have been prejudiced by these statements and we can conceive no possible prejudice. This claim is meritless.

See Document #13, Respondent's Reproduced Record, Vol. I, at p. 70.

On appeal, the Superior Court agreed that "[t]he trial judge was simply responding to defense counsel's objection and providing justification for overruling said objection. Further, the trial judge's remarks were not prejudicial to [Petitioner's] case. The trial judge's comments actually bolstered [Petitioner's] defense theory that the identification witness could not see very well and consequently weakened the value of [his] identification testimony and, correspondingly, the Commonwealth's case." (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 35).

This Court agrees with the State courts' analysis regarding the trial judge's comments. As with the in-

court identification, Petitioner has failed to demonstrate that the trial judge's remarks made in connection with the identification "inherently resulted in a complete miscarriage of justice or in an omission inconsistent with the rudimentary demands of fair procedure." Thus, Petitioner's claim in the regard is not cognizable in habeas corpus.

5. Trial Court's Denial of Pretrial Motion Challenging Sufficiency of Affidavit of Probable Cause

Petitioner claims that the trial court erred in denying his pretrial motion to suppress evidence based on the alleged insufficiency of the affidavit of probable cause. In *Stone v. Powell*, 428 U.S. 465, 494 (1976), the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Thus, even if a state court resolves a Fourth Amendment issue summarily or erroneously, *Stone* bars federal courts from hearing such claims on habeas review. *Marshall v. Hendricks*, 307 F.3d 36, 82 (3d Cir. 2002). Federal courts will only address Fourth Amendment claims on habeas review where "a structural defect in the system prevented [the] claim from being heard." *Id.*

Here, there was no structural defect that prevented Petitioner's Fourth Amendment claim from being heard in the State courts. Petitioner was provided a full and fair opportunity to litigate his challenge to the affidavit of probable cause during pretrial suppression proceedings before the trial court. The Superior Court also fully considered Petitioner's Fourth Amendment claim on direct appeal, concluding that "when the four corners of

the affidavit of probable cause are reviewed in light of the totality of the circumstances, a substantial basis existed for the search of the residence and that there was a reasonable probability that evidence of the crime sought in the affidavit would be found there." (*See* Document #16, Respondent's Reproduced Record, Vol. IV, Document 4 at p. 38).

Because the State courts provided Petitioner with a full and fair opportunity to litigate his Fourth Amendment claim, habeas review of this claim is barred by the Supreme Court's decision in *Stone*.

F. Certificate of Appealability

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* (28 U.S.C. § 2253(c). Petitioner has not made a showing that he has been denied any of his constitutional rights. Accordingly, a certificate of appealability should be denied.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the instant petition for writ of habeas corpus be dismissed and that a certificate of appealability be denied.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

SUSAN PARADISE BAXTER
UNITED STATES
MAGISTRATE JUDGE

Dated: June 3, 2005

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 04-164-Erie

TYSON A. DITCH,
Petitioner,

v.

JAMES L. GRACE,
Respondent.

MEMORANDUM AND ORDER

This petition for writ of habeas corpus was received by the Clerk of Court on June 14, 2004, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 29 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommenda-

tion, filed on June 3, 2005, recommended that the petition for writ of habeas corpus be dismissed and that a certificate of appealability be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on Petitioner by certified mail at SCI Huntingdon, where he is incarcerated, and on Respondent. Objections were filed by Petitioner on June 12, 2005. After *de novo* review of the petition and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 28th Day of June 2005;

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is DISMISSED and that a certificate of appealability is DENIED.

The report and recommendation of Magistrate Judge Baxter, dated June 3, 2005, is adopted as the opinion of the court.

SEAN J. McLAUGHLIN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3614

TYSON ALAN DITCH,
Appellant,

v.

JAMES L. GRACE.

March 1, 2007, Decided
October 25, 2006, Argued

OPINION

ROBERT E. COWEN, Sr., Appeals Judge

Tyson A. Ditch appeals from an order of the United States District Court for the Western District of Pennsylvania dismissing his petition for writ of habeas corpus filed under 28 U.S.C. § 2254. For the reasons stated below, we will affirm the order of the District Court.

I.

At approximately 3:00 a.m. on February 18, 1998, ten gunshots were fired into the front door of the apartment of Dasha Yenney, Ditch's former girlfriend. The police arrived, and, upon investigation, found bullet fragments and a casing from a nine millimeter bullet outside of the apartment. Yenney informed the police that she had recently received harassing telephone calls from Ditch, and that Ditch had been arrested in the past for harassing and physically abusing her. While the police were investigating the crime scene, Ditch telephoned Yenney. When the police attempted to speak to him, he terminated the call. The police traced the call to Ditch's brother's residence and obtained warrants to search the residence. Upon execution of the warrants, the police found Ditch asleep in the attic of the residence, and, approximately fifteen feet away from him, a nine millimeter Ruger pistol. The police arrested Ditch and took him into custody. Later, based upon a ballistics analysis, the Pennsylvania State Police laboratory determined that the bullet fragments and casing retrieved from the crime scene were fired from the same pistol seized from the attic.

On June 16, 1998, Ditch appeared without counsel at a preliminary hearing. At the hearing, Ditch asked the presiding judge for a continuance in order to seek counsel. He related to the judge that he had made several telephone calls to an attorney, but had not yet received an answer to his calls. The judge denied the request, reasoning only that twenty days had elapsed since the arraignment. After presenting Ditch with a Waiver of Counsel form, which Ditch refused to sign, the judge proceeded with the hearing. At the uncounseled hearing, Ronald

Fry, a witness for the Commonwealth, identified Ditch as the individual he saw leaving the apartment building in the early morning hours of the day of the incident.

At trial Fry testified that he made a positive identification of Ditch at the preliminary hearing. He also made a positive identification of Ditch at trial, but only after he was permitted to leave the witness stand and approach the defense table. He testified that he could not identify Ditch from the witness stand because his eyes are light-sensitive. Fry further admitted that he was legally blind and was not wearing glasses at the time of the incident. He testified, however, that he did not have any difficulty seeing Ditch through his apartment window at the time of the incident, even though his window was located approximately ten or fifteen feet away from Yenney's apartment door. He testified that the area of the apartment building in which he saw Ditch was well-lit.

Following trial, Ditch was convicted by a jury of criminal attempt to commit burglary, reckless endangerment of another person, and unlawful possession of a firearm. He was also convicted of the summary offense of criminal mischief. Ditch was sentenced to an aggregate term of imprisonment of seven-and-a-half to fifteen years. On May 3, 2001, the Superior Court of Pennsylvania affirmed Ditch's convictions, and on December 30, 2003, the Pennsylvania Supreme Court denied Ditch's petition for allowance of appeal, which was filed nunc pro tunc.

On June 21, 2004, Ditch filed a petition for writ of habeas corpus with the District Court under § 2254, challenging several aspects of his convictions. The District Court denied the petition and found no basis for issuance of a Certificate of Appealability ("COA").

On December 20, 2005, this Court granted Ditch's request for a COA with respect to two issues: (1) whether

the District Court erred in denying his petition for writ of habeas corpus as to Ditch's claim that he was denied his constitutional right to counsel at his preliminary hearing; and (2) whether the District Court erred in denying his petition for writ of habeas corpus as to Ditch's claim that he was deprived of effective assistance of counsel because trial counsel failed to file a motion to suppress the identification which occurred at the uncounseled preliminary hearing.[6] We have jurisdiction to review Ditch's claims under 28 U.S.C. §§ 1291 and 2253.

II.

A.

Ditch's first argument is that the District Court should have granted his habeas petition because he was denied his right to counsel at his preliminary hearing in violation of the Sixth Amendment of the Constitution. For the reasons stated below, we conclude that while Ditch was denied counsel at his preliminary hearing, he is not entitled to habeas relief because the constitutional error was harmless.

1.

We begin our analysis by considering Ditch's claim that he had a right to, but was denied, counsel at his preliminary hearing. In *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970), the Supreme Court held that a defendant was entitled to representation of counsel at his Alabama preliminary hearing. The Court reasoned that under Alabama law a preliminary hearing is a "critical stage" of the criminal prosecution. *Id.* The Court noted that at an Alabama preliminary hearing, the accused is discharged or

---

[6] We conclude that the certified claims were fairly presented to the state court on direct review for purposes of the exhaustion requirement under 28 U.S.C. § 2254(b). See *McCandless v. Vaughn*, 172 F.3d 255, 260-61 (3d Cir. 1999).

held to answer, as the facts may warrant, and that the hearing seeks to determine whether there is probable cause to believe that a crime has been committed and serves to protect the accused from groundless prosecutions, among other things. *Id.* at 8. The Court then delineated the advantages of a lawyer's assistance at such a hearing:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Id. at 9. In light of the defendant's inability to realize these advantages on his own, the Court concluded that the defendant was as much entitled to the aid of counsel at the Alabama preliminary hearing as at the trial itself. *Id.*

Applying the reasoning used in Coleman, we conclude that a Pennsylvania preliminary hearing is also a critical stage in a criminal prosecution. At a Pennsylvania preliminary hearing, the Commonwealth may assume charge of the prosecution and recommend to the issuing author-

ity that the defendant be discharged or bound over to the court. *See* PA. R. CRIM. P. 542(A). At the hearing, "the Commonwealth bears the burden of establishing at least a prima facie case that a crime has been committed and that the accused is probably the one who committed it." *Commonwealth v. Oliver*, 869 A.2d 1167, 1171 (Pa. Commw. Ct. 2005) (citations omitted). Moreover, as in Alabama, a principal function of the hearing in Pennsylvania is to protect the accused's right against an unlawful arrest and detention. *Id.*

Because the Pennsylvania preliminary hearing is a critical stage of a criminal prosecution, we likewise conclude that Ditch was entitled to the assistance of effective counsel at that hearing. *See Coleman*, 399 U.S. at 9-10; *Commonwealth v. Carver*, 436 A.2d 1209, 1211 (Pa. Super Ct. 1981) ("It is axiomatic that the preliminary hearing is a 'critical stage' of a criminal proceeding, at which [the accused] is entitled to the assistance of effective counsel."); *Commonwealth v. Rines*, 372 A.2d 901, 902 (Pa. Super. Ct. 1977) ("It is, of course, well settled that a defendant is entitled to the effective assistance of counsel at a preliminary hearing."); *see also Commonwealth v. Sawyer*, 357 A.2d 587, 589 (Pa. Super Ct. 1976); *Commonwealth v. Redshaw*, 323 A.2d 92, 93 (Pa. Super. Ct. 1974).

Based upon the record before us, it is clear that Ditch was denied his right to counsel at the preliminary hearing. At the beginning of the hearing, Ditch informed the state court judge that he wished to secure representation and requested a continuance to do so, but the judge denied the request, reasoning only that twenty days had elapsed since the arraignment. There is nothing in the record to suggest that Ditch waived or forfeited his right to counsel. Thus, we conclude that Ditch was denied his right to counsel at his preliminary hearing in violation of the Sixth Amendment.

2.

Having concluded that Ditch was denied his right to counsel, there remains the question of relief. Ditch argues that the denial of counsel warrants automatic vacatur of his conviction. In support, he argues that a preliminary hearing is a critical stage of the prosecution and that at his preliminary hearing a witness made a positive identification of him which was later used against him at trial. For the reasons given below, we conclude that the test to be applied in this case is whether the denial of counsel at the preliminary hearing was harmless error.

A denial of counsel at a preliminary hearing does not automatically entitle an accused to vacatur and a new trial. *See Coleman*, 399 U.S. at 11. In *Coleman*, the Supreme Court found that the defendants were denied their right to counsel at their preliminary hearing, but remanded for a determination of "whether the denial of counsel at the preliminary hearing was harmless error." *Id.* Indeed, *Coleman* stands for the proposition that even though a preliminary hearing may be a critical stage in the criminal process, a denial of counsel at the preliminary hearing does not automatically warrant vacatur.

Ditch's other argument in support of vacatur is more persuasive, albeit ultimately unavailing. Ditch underscores that a witness identification made at the uncounseled preliminary hearing was later used against him at trial. He claims that the lack of counsel under these circumstances infected the entire proceeding and warrants vacatur. *See Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (stating that only those "Sixth Amendment violations that pervade the entire proceeding" can never be considered harmless" (emphasis added)).

Notably, *Coleman* does not address the appropriate relief in a case involving a denial of counsel at a prelimi-

nary hearing where evidence obtained from the hearing is later used against the defendant at trial. In *Coleman*, the state trial court prohibited the use at trial of any of the evidence gathered at the uncounseled pretrial proceeding. Indeed, in prescribing a harmless error analysis, the *Coleman* Court specifically noted that the trial court had scrupulously observed that prohibition. 399 U.S. at 10 (citing for comparison the case of *White v. Maryland*, 373 U.S. 59 (1963)). Thus, while as a general proposition *Coleman* provides support for application of a harmless error standard in cases involving the denial of counsel at preliminary hearings, we cannot rest our conclusion solely on that case.

Insofar as evidence obtained from the uncounseled preliminary hearing was later used against Ditch at trial, this case resembles *White*, *supra*. In *White*, the defendant's admission of guilt entered at a preliminary hearing without counsel was later used against the defendant at trial. 373 U.S. at 59-60. In *White*, unlike the case in *Coleman*, the Supreme Court found structural error and vacated the defendant's criminal conviction without a showing of prejudice. *Id.* at 60. However, as with *Coleman*, this case is factually distinguishable from *White*, in that the tainted evidence here was a witness's positive identification of the accused, not an irreversible admission of guilt. Thus, the question of relief presented by the facts of this case is not squarely addressed by either *Coleman* or *White*.

Although neither *Coleman* nor *White* is apposite, we find solace in another line of Supreme Court case law which clearly prescribes a harmless error standard in cases involving the admission of evidence at trial of uncounseled pretrial identifications. *See Gilbert v. California*, 388 U.S. 263, 274 (1967) (prescribing a harmless error standard to the admission at trial of testimony of an

uncounseled pretrial identification); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) ("In view of the violation of petitioner's Sixth and Fourteenth Amendment right to counsel at the pretrial corporeal identification, and of the prosecution's exploitation at trial of evidence derived directly from that violation, we reverse the judgment of the Court of Appeals and remand for a determination of whether the failure to exclude that evidence was harmless constitutional error . . . ."). In both *Gilbert* and *Moore*, the Supreme Court opined that the ultimate admission of evidence of an identification made at a pretrial proceeding without counsel is subject to a harmless error standard.

Since the ultimate admission of evidence of an uncounseled identification is subject to a harmless error standard, we conclude by extension of *Gilbert* and *Moore*, that the underlying denial of counsel is also subject to a harmless error analysis. Unlike the irreversible admission of guilt in *White*, the admission of an uncounseled identification does not necessarily "pervade the entire proceeding," *Satterwhite*, 486 U.S. at 256, nor is it "necessarily unquantifiable and indeterminate," *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). In sum, based upon the confluence of *Coleman*, *Gilbert* and *Moore*, we hold that the denial of counsel at Ditch's preliminary hearing is subject to a harmless error standard, even though evidence of the identification made at the hearing was later used against him at trial.

3.

Next, we address Ditch's related contention that even if no structural error occurred, he is entitled to a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court "identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused

that the cost of litigating their effect in a particular case is unjustified.'" *Bell v. Cone*, 535 U.S. 685, 695 (2002) (quoting *Cronic*, 466 U.S. at 658-59). The *Cronic* Court said that the first and "[m]ost obvious" situation in which a presumption of prejudice applies is a "complete denial of counsel." 466 U.S. at 659. The Court explained that a trial would be presumptively unfair where the accused is denied the presence of counsel at "a critical stage." *Id.* Ditch argues that because he was denied counsel at a "critical stage" of litigation, he is entitled to an automatic presumption of prejudice under *Cronic*.

Ditch's argument has some appeal. Under an expansive reading of *Cronic*, a denial of counsel at any critical stage, including a preliminary hearing, would warrant a presumption of prejudice. However, we conclude that *Cronic* should be read in a more limited fashion. We agree with the Court of Appeals for the Fourth Circuit in *United States v. Owen*, 407 F.3d 222 (4th Cir. 2005), which case is discussed below, that *Cronic* prescribes a presumption of prejudice only with regard to those critical stages of litigation where a denial of counsel would necessarily undermine the reliability of the entire criminal proceeding.

In *Owen*, the defendant claimed that he was denied his right to counsel at his criminal arraignment and that he was entitled to a presumption of prejudice under *Cronic*. *Id.* at 225, 228. The *Owen* court disagreed with the defendant's claim that he was denied his right to counsel, but indicated that even if he had been denied his right to counsel, he was not entitled to a presumption of prejudice under *Cronic* and the error was harmless. *Id.* at 225-229. The court opined that *Cronic* relies on a narrow usage of the phrase "critical stage" to mean a proceeding at which a denial of counsel would necessarily undermine the reliability of the entire criminal proceeding. *Id.* at

228. The *Owen* court observed that, in other cases such as *Coleman*, the Supreme Court has used the phrase "critical stage" in a broader sense, to refer to all proceedings at which the Sixth Amendment right to counsel attaches, including those at which the denial of such is subject to harmless error analysis. *Id.* Thus, while Owen's arraignment was a "critical stage" of litigation at which the right of counsel attaches under *Coleman*, an uncounseled arraignment would not necessarily undermine the entire criminal proceeding requiring a presumption of prejudice under *Cronic*. *Id.* at 228-29. Accordingly, citing to *Coleman*, the *Owen* court applied a harmless error analysis. *Id.*

Like our sister court in *Owen*, we read *Cronic* in a limited fashion. A denial of counsel at any critical stage at which the right to counsel attaches does not require a presumption of prejudice. Rather, a presumption of prejudice applies only in cases where the denial of counsel would necessarily undermine the reliability of the entire criminal proceeding. *See also Hammonds v. Newsome*, 816 F.2d 611, 613 (11th Cir. 1987) (interpreting *Cronic* in a limited fashion); *Takacs v. Engle*, 768 F.2d 122, 124 (6th Cir. 1985) ("*Coleman's* harmless error analysis remains good law."). Because we cannot conclude that the denial of counsel at the preliminary hearing necessarily undermined the entire criminal proceeding, we will apply a harmless error analysis in this case.

4.

We now turn to the salient question of whether the denial of Ditch's right to counsel at his preliminary hearing was harmless error. To determine whether constitutional error in a habeas case was harmless, we must decide whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *see also Hassine*

v. Zimmerman, 160 F.3d 941, 953 (3d Cir. 1998) (holding that "a federal habeas court performing a harmless error inquiry on collateral review must employ the standard for harmless error articulated in *Brecht*, even if the state courts have never reviewed the error on direct appeal.").

In making the harmless error determination, "the crucial inquiry is the impact of the error on the minds of the jurors in the total setting." *Hassine*, 160 F.3d at 955 (citations and internal quotation marks omitted). "While the nature of the evidence against [Ditch] is important, we must also examine the phases of the trial affected by the error, and determine whether the error had a substantial influence on the verdict despite sufficient evidence to support the result apart from the error." *Id.* "In doing so, we must of necessity weigh the impact of evidence on the jury and cannot help but make a judgment as to how the jury would reasonably perceive [Ditch's] version of the events with and without the [denial of counsel] violation." *Id.*

The record before us indicates that the evidence of guilt at trial was substantial. The Commonwealth presented unchallenged expert ballistics testimony. The ballistics expert testified that bullet fragments and a shell casing found at the crime scene matched the nine millimeter Ruger hand gun which the police found later that same morning within fifteen feet of Ditch. As even Ditch conceded in one of his briefs filed in state court, "[t]here is no question that the most 'damming' evidence received by the jury at trial was the ballistics evidence linking the crime scene evidence to a firearm discovered at the home of Mr. Ditch's brother, where, apparently, Mr. Ditch the[n] resid[ed]." (Memorandum in Support of Defendant's Motion for Post Conviction Collateral Relief at 8.)

In addition to the unchallenged ballistics evidence, the Commonwealth presented evidence linking Ditch to

Dasha Yenney in the evening hours before the crime. As noted in Section I above, Yenney, a formal girlfriend of Ditch, lived in the apartment into whose door the gunshots were fired. The Commonwealth presented evidence that Yenney had received harassing telephone calls from Ditch in the evening of February 17, 1998, and that Ditch had been arrested in the past for harassing and physically abusing her. Thus, the weight of the evidence against Ditch at trial was substantial.

Even if the evidence against Ditch was substantial, the conviction must be vacated and a new trial ordered if the denial of counsel had a substantial influence on the verdict despite the substantial evidence. Here, the phase of trial most directly impacted by the denial of counsel was Fry's testimony. Fry testified that he had identified Ditch at the preliminary hearing and again identified him at trial, and he did give some details about the night of the incident, including a general description of the clothing that the individual was wearing.

However, Fry's identification testimony was not a particularly strong part of the Commonwealth's case, for at least two reasons. First, Fry admitted on the stand that he was legally blind and was not wearing glasses at the time of the incident. Second, Fry admitted at trial that he could not see Ditch from the witness stand. Fry was not able to identify Ditch until the judge permitted him to leave the witness stand and approach the defense table. Even the judge noted for the record that "[i]t was obvious from the witness stand that he couldn't see anybody out in the courtroom." (App. at 57.) Thus, the record is clear that there were substantial weaknesses in Fry's identification testimony which were brought out at trial.

Admittedly, the guiding hand of counsel at the preliminary hearing would have been beneficial to the defendant's case at trial. At the preliminary hearing,

trained counsel would have conducted a cross-examination of Fry to expose weaknesses in his testimony and for use as an impeachment tool at trial.

Nevertheless, we conclude that the denial of counsel ultimately did not have a substantial or injurious effect on the jury's ultimate verdict. There was substantial evidence of guilt, and the jury was well-apprised of the weaknesses in Fry's identification testimony. For these reasons, we conclude that the constitutional error was harmless.

B.

Ditch's second and final claim is that trial counsel was constitutionally ineffective for failing to seek to suppress the identification made at the preliminary hearing without counsel. Because a Pennsylvania state court adjudicated his ineffective assistance of counsel claim, we may grant habeas relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362 (2000). For the reasons stated below, we conclude that the state court's decision was not contrary to, nor an unreasonable application of, clearly established law as determined by the Supreme Court, and thus habeas relief is inappropriate.

In considering Ditch's ineffective assistance of counsel claim, we are guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong of that test, "the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Under the second prong, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. In other words, "[t]he defendant must show that there is a reason-

able probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In determining whether the second prong has been met, we consider "the totality of the evidence before the judge or jury," mindful that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 695-96.

Applying the first prong of the *Strickland* test, we conclude that Ditch's trial counsel's performance fell below an objective standard of reasonableness. As discussed above, Ditch was unquestionably denied his right to counsel at the preliminary hearing at which the identification was made. Moreover, it is clearly established law that evidence of an uncounseled pretrial identification is subject to a *per se* exclusionary rule. *See Gilbert*, 388 U.S. at 273 (holding that identification testimony given at a pretrial line-up without counsel is *per se* inadmissible and that the state is not entitled to an opportunity to show that the testimony had an independent source); *Moore*, 434 U.S. at 231 ("*Gilbert* held that the prosecution cannot buttress its case-in-chief by introducing evidence of a pretrial identification made in violation of the accused's Sixth Amendment rights, even if it can prove that the pretrial identification had an independent source.") (applying the strict rule of *Gilbert* to identification testimony given at an uncounseled preliminary hearing).

Under the strict exclusionary rule of *Gilbert*, *supra*, the identification made at the preliminary hearing without counsel was *per se* inadmissible, and the Commonwealth would not have been entitled to an opportunity to show that the identification had an independent source. Accordingly, we conclude that trial counsel's performance

fell below an objective standard of reasonableness when he did not file a motion to suppress the identification. Hence, the first prong of the *Strickland* test is satisfied.

The second prong of the *Strickland* test, which requires us to determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, however, is not satisfied.[7] As discussed in detail in Section II.A.4 of this opinion, the jury's verdict was supported by overwhelming evidence of guilt, including unchallenged ballistics evidence. Moreover, as also discussed therein, given Fry's admittedly poor eyesight, the pretrial identification evidence proved to be a relatively weak aspect of the Commonwealth's case. For these reasons, we cannot say that there is a reasonable probability that the result of the proceeding would have been different.

In sum, based upon an application of the *Strickland* test, we conclude that trial counsel was not constitutionally ineffective for failing to seek to suppress the identification made at the preliminary hearing. We, therefore, hold that the trial court's decision was not contrary to, nor an unreasonable application of, Supreme Court precedent, and thus habeas relief may not be granted.

III.

For the foregoing reasons, the judgment of the District Court entered on June 29, 2005, will be affirmed.

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[7] *See supra* Section II.A.3 for a discussion as to why a presumption of prejudice does not apply.

(2)

No. 07-91

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

TYSON A. DITCH,

Petitioner,

v.

JAMES L. GRACE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETTITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioner's denial of counsel at a state criminal preliminary hearing a constitutional "structural error," which contaminated the entire criminal proceedings against the Petitioner requiring automatic renewal of his conviction or a constitutional error subject to a harmless error analysis as determined by the Third Circuit Court of Appeals?

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SUMMARY OF REASONS TO DENY THE PETITION

There is no split of authority among Third Circuit Court of Appeals decisions on the legal test used to assess the denial of counsel at a state criminal preliminary hearing. The decision under review from the Third Circuit correctly states those tests. Petitioner disagrees with the application of settled law to his claim. Petitioner's dissatisfaction is not a compelling reason to grant review. Your Honorable Court divides constitutional errors into two classes. The first is called a "trial error." Trial errors are the errors occurring during the presentation of the case to the jury and their effect may be quantitatively accessed in the context of other evidence presented in order to determine whether the errors were harmless beyond a reasonable doubt. These include most constitutional errors.

The second class of constitutional errors is called "structural defects." These defy analysis by the harmless error standards because they effect the framework within which the trial proceeds and are not simply an error in the trial process itself.

Petitioner's dissatisfaction with the Third Circuit's decision is not a compelling reason to grant review. The Third Circuit in its opinion below, determined that lack of counsel at a state preliminary hearing was not a "structural error" requiring automatic reversal. Instead, it correctly analyzed the lack of counsel at a preliminary hearing by a harmless error analysis. The error the Petitioner complains of did not cast systematic doubt on the subsequent proceedings and did not "effect and contaminate" the entire trial by placing Petitioner in an ineradicable unfair disadvantage. A Sixth Amendment

violation requires automatic reversal only when the constitutional violation pervades the entire criminal proceeding. *Satterwhite v. Texas*, 486 U.S. 249 (1988).

STATEMENT OF THE CASE

Correct Statement of the Facts

On February 18, 1998, at approximately 2:45 a.m., Dasha Yenny, the victim and Petitioner's former girlfriend, reported to police that someone had shot a gun into the front door of the apartment where she, her three year old daughter, and her boyfriend Jeffrey Barksdale were sleeping. The police found a shell casing from a 9 mm bullet outside of the victim's apartment and believed that the numerous bullet holes found in the victim's door were made from a gun similar to this caliber. The victim told the investigating officer that she had recently received harassing telephone calls from Petitioner within several hours of the shooting in which Petitioner had threatened her with physical harm. The victim also related to the officer that Petitioner had been arrested in the past for harassing and physically abusing her.

Approximately twenty minutes after the shooting and while the police were at Dasha Yenny's residence the Petitioner called the victim numerous times by telephone. He asked the victim why she was telling the police he was doing something when his daughter was in the house. At that time the victim had only told the trooper who was standing beside her about the shooting. When the police officer attempted to speak to Petitioner, Petitioner terminated the calls. A phone trace of his calls determined that it had been originated at the residence of Petitioner's

brother. The victim informed the police that the Petitioner resided at his brother's residence. A firearms ownership inquiry determined that two 9 mm handguns were registered to Petitioner's brother.

A neighbor in an apartment near the victim's apartment, one Ronald Fry, reported to the investigating officer that he had heard shots fired into the victim's apartment. Fry further reported that he subsequently saw an individual leave the area and enter a white automobile. Fry stated that the white automobile then left the scene at approximately 3:30 a.m. Troopers from the Pennsylvania State Police drove to Petitioner's brother's residence and observed a white automobile parked nearby. The troopers felt the hood of the automobile and determined that it was still warm to the touch. Based upon the above information search warrants were issued. Later that morning the Pennsylvania State Police executed the search warrants at the residence of Petitioner's brother. During the course of the search the police found the Petitioner sleeping in the attic of the residence. Petitioner was the only occupant of the residence at the time of the search. Approximately fifteen feet away from Petitioner a 9 mm Ruger pistol was found under some clothing. The Pennsylvania State Police laboratory analyzed the 9 mm Ruger pistol and determined that it held ten rounds of ammunition, and that fragments from at least one of the bullets found at the apartment of Dasha Yenny were fired from this pistol. In addition, laboratory analysis also determined that one spent shell casing found at the scene was fired from the same gun.

At trial Ronald Fry made a positive independent in-court identification of the Petitioner as the person he saw at the victim's apartment building on February 18, 1998,

shortly after hearing gunshots in the corridor of the apartment building and male voice say "Open the damn door."

REASONS FOR DENYING THE PETITION

The Third Circuit Decision Was Correct

This Honorable Court has divided constitutional errors into two classes. The first is "trial errors," which occur during the presentation of the case to the jury. These are analyzed under the harmless error test. These include most constitutional errors. The second class of constitutional error is called "structural defects." These defy analysis by harmless error standards because they can effect the framework within which the trial proceeds. As such, if there is a constitutional structural error, automatic reversal is required.

If there is a violation of the Sixth Amendment right to counsel at a "critical stage" an inflexible rule of reversal is not warranted. Allowing district and circuit courts a flexible approach in deciding whether a Sixth Amendment violation is a constitutional trial error subject to the harmless error analysis or a structural error subject to an automatic reversal is the procedure that has been followed consistently by Circuit Courts and this Honorable Court. *Van v. Jones*, 475 F.3d 292 (6th Cir. 2007).

The Third Circuit correctly applied a harmless error standard to Petitioner's case involving the admission of evidence at trial of uncounseled pretrial identification. In doing so the court cited *Gilbert v. California*, 388 U.S. 263

(1967) and *Moore v. Illinois*, 434 U.S. 220 (1977). Further, the Third Circuit in its opinion stated:

> "Unlike the irreversible admission of guilt in *White v. Maryland*, 373 U.S. 59 (1963) the admission of an unconcealed identification does not necessarily 'pervade the entire proceeding,' nor is it 'necessarily unquantifiable and indeterminate, . . .'"

The Third Circuit Court also stated:

> "Because we cannot conclude that the denial of counsel at the preliminary hearing necessarily undermined the entire criminal proceeding, we will apply a harmless error analysis in this case."

(Third Circuit opinion, page 8)

Further, the Third Circuit Court found the strength of the prosecution's evidence not withstanding the eyewitness identification, as well as defense counsel's exhaustive examination of the eyewitness at trial raised substantial credibility problems with the identification. The court found the deprivation of petitioner's right to counsel at the preliminary hearing did not have a substantial and injurious effect on the jury's verdict. The denial of counsel at a preliminary hearing is not a "structural error" that requires automatic reversal of a conviction regardless of any prejudice to the defendant. *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970). In *Coleman*, although a preliminary hearing required by state law is a "critical stage" of the prosecution to which the right of counsel adheres, the Supreme Court nevertheless remanded the case to the State Court for consideration of whether the denial of counsel constituted harmless error. Reversal is automatically required only when the error occurs during a critical stage and "effects and contaminates" the entire trial. *United States v. Owen*, 407 F.3d 222 (4th Cir. 2005).

Contrary to Petitioner's assertion, the opinion of the Third Circuit under review does not create a new subset of Sixth Amendment violations involving complete denial of counsel at a critical stage that are not subject to the *United States v. Cronic*, 466 U.S. 648 (1984) presumption of prejudice. (Petition pages 7-8).

The Third Circuit opinion correctly applies *Coleman v. Alabama*, 399 U.S. 1 (1970). The Third Circuit determined that a state preliminary hearing is a critical stage. (Third Circuit opinion page 5). Further, the Third Circuit found Petitioner was entitled to counsel at a preliminary hearing. However, the Third Circuit correctly determined that Petitioner's denial of the Sixth Amendment right to counsel at a preliminary hearing was harmless error. Relying on *Coleman* the court held that though a preliminary hearing is a critical stage in the criminal process, a denial of counsel at a preliminary hearing "does not automatically warrant vacatur" (Third Circuit opinion page 7). Citing *Gilbert v. California*, 388 U.S. 263 (1967) and *Moore v. Illinois,* 434 U.S. 220 (1977). The Third Circuit held admission of Petitioner's identification made at a pretrial hearing without counsel is subject to the harmless error standard. Further, the Third Circuit correctly determined the presumption of prejudice as set forth in *United States v. Cronic,* 466 U.S. 648 (1984) only applies to structural error cases. (Third Circuit opinion page 9).

In *United States v. Gonzales-Lopez*, 126 S.Ct. 2557 (2006), the Supreme Court of the United States stated: "The touchstone of structural error is fundamental unfairness and unreliability. An automatic reversal is strong medicine that should be reserved for constitutional errors that 'always' or 'necessarily' produce unfairness." *Id.* at pg. 2570.

The Third Circuit properly analyzed Petitioner's case in its opinion. First it determined that the preliminary hearing was a critical stage and the Petitioner had a right to counsel at that hearing. It further determined that denial of counsel was a constitutional error. It also determined the pretrial identification of the Petitioner at the preliminary hearing by a witness was not a structural error, but a constitutional error subject to the harmless error test. In support thereof the court stated that the trial evidence against Petitioner was "substantial" including phone calls and threats to the victim before and after the shooting. In addition the court found there was substantial unchallenged ballistic evidence against the Petitioner. Specifically, that the 9 mm gun found near the Petitioner at the time of his arrest discharged, to the exclusion of all other firearms, the shell casings and bullet fragments found at the scene of the shooting.

CONCLUSION

The decision under review breaks no new ground. It does not decide an important question of federal law that has not been, which should be, settled by the Supreme Court. The holdings in the decision are consistent with relevant decisions of this Court. See, Supreme Court Rule 10(c). Petitioner's Petition merely disagrees with the application of settled law to his claim.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the petition. Respondent respectfully requests that the petition be denied.

Respectfully submitted,

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In the Supreme Court of the United States

TYSON A. DITCH, PETITIONER

v.

JAMES L. GRACE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Nothing in the brief in opposition casts any doubt on our showing (Pet. 8-19) that the lower courts are divided over the appropriate remedy for a complete denial of a criminal defendant's right to counsel at a critical stage of the prosecution. As we demonstrated, the Third Circuit—like the Fourth and Tenth Circuits, and the Connecticut Supreme Court—holds that the denial of counsel at a critical stage is subject to harmless error analysis, whereas the Sixth, Ninth, and Eleventh Circuits hold that such denials of counsel automatically require reversal. The conflict on this recurring and important issue is thus both wide and entrenched, and only this Court's review can resolve it.

Respondent's sole response is that "[t]here is no split of authority among Third Circuit Court of Appeals decisions on the legal test used to assess the denial of counsel at a state preliminary hearing." Opp. 1. But this is irrelevant: the conflict we are relying upon is not *among* Third Circuit decisions (which would justify rehearing en banc), but *between* the Third Circuit's approach—which two other circuits and one state supreme court follow—*and that of at least three other Circuits* (which makes the case appropriate for this Court's resolution). Respondent concedes the existence of the conflict, but asserts that "an inflexible rule of reversal is not warranted" and that this Court should "[a]llow[] district and circuit courts a flexible approach in deciding whether a Sixth Amendment violation is a constitutional trial error subject to the harmless error analysis or a structural error subject to an automatic reversal." Opp. 4. The question whether denying a criminal defendant the right to counsel at a critical stage is subject to harmless error analysis, however, is both recurring and too important to allow divergence among the lower courts.

Respondent's remaining arguments boil down to points on the merits that, even if correct (and they are not), would not undermine the importance of granting review.

Respondent does not deny that more than 35 States and the federal courts have preliminary hearings similar to those in Pennsylvania—and thus that the question presented has ramifications for thousands of other cases annually. See Pet. 20. Nor does respondent dispute the general significance of the constitutional issues involved. See Pet. 22-24. As shown in the petition, the "harmless error" test applied by the court below (and others) effectively eviscerates the fundamental and historical protections of the Sixth Amendment right to counsel, replacing core constitutional safeguards with post hoc rationalizations designed to support a tainted verdict. Thus, even apart from the conflicts among the lower courts, the need for clear guidance on this recurring issue of national significance warrants this Court's plenary review.

We address respondent's arguments in greater detail below.

1. Citing the absence of any "split of authority among Third Circuit decisions" on the question presented, respondent first maintains that petitioner merely "disagrees with the application of settled law to his claim." Opp. 1. Even assuming that the decision below "settled" the law in the Third Circuit, however, respondent ignores our showing (Pet. 9-14) that conflicting legal standards among the several circuits would lead to different results in comparable cases.[1]

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[1] Petitioner did seek rehearing en banc on this issue, noting, for instance, that the Third Circuit in *United States* v. *Salemo*, 61 F.3d 214 (1995), had "decline[d] to engage in a harmless error analysis" where the defendant was not represented by counsel at a sentencing hearing (also a "critical stage") because the right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *Id.* at 221-222; but see *id.* at 223-224 (Alito, J. concurring) (declining to address "whether the unconstitutional deprivation of counsel at sentencing can be harmless" where resolution of the question was not necessary to

It cannot seriously be disputed that this case would have come out the other way if the court below had applied the Sixth, Ninth, or Eleventh Circuit's rule. In those courts, the "complete absence of counsel at a critical stage of a criminal proceeding is a per se Sixth Amendment violation warranting reversal of conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error." *Van* v. *Jones*, 475 F.3d 292, 311-312 (6th Cir. 2007); see also *Hunter* v. *Moore*, 304 F.3d 1066, 1069-1070 (11th Cir. 2002) (affirming the district court's reversal of a state court's denial of habeas relief on harmless error grounds, holding that "the denial of counsel at a critical stage . . . warrants reversal without a specific showing of prejudice"); *Plumlee* v. *Del Papa*, 465 F.3d 910, 923 (9th Cir. 2007) (concluding that actual denials of counsel mandate a legal presumption of prejudice without any "further showing that the trial judge's erroneous [actions] resulted in prejudice"); Pet. 11-13. Thus, the complete denial of counsel at a preliminary hearing would mandate automatic reversal in those circuits, while the Third, Fourth, and Tenth Circuits, and the Connecticut Supreme Court would apply a harmless error test to determine whether to reverse such a conviction. Pet. 10-11.

Respondent does not address the conflict among these courts and, with one exception, does not even *cite* the cases that conflict with the decision below. The exception is *Van* v. *Jones*, but respondent cites that case only for the proposition that this Court should "allow[] district and circuit courts [to adopt] a flexible approach in deciding whether a Sixth Amendment violation is a constitutional trial error subject to the harmless error analysis or a structural error subject to an automatic reversal." Opp. 4. Respondent thus acknowledges that these courts apply different legal tests to Sixth Amendment violations to arrive at different

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decide the case and in light of the fact that different lines of Supreme Court authority point in different directions on the issue).

outcomes—and that the scope of the Sixth Amendment right to counsel varies substantially from circuit to circuit. The basis for review under Supreme Court Rule 10, however, is the need for uniformity among lower court decisions, and variability (or elasticity) should not be the hallmark of judicial decisions on important federal questions such as the scope of the constitutional right to be represented by counsel during a criminal proceeding.

2. Respondent also neglects to address the conflict between the decision below and decisions of this Court. See Pet. 14-17. For example, he does not address the tension between the holding below and *United States* v. *Gonzales-Lopez*, 126 S. Ct. 2557 (2006), which would require automatic reversal for the denial of the defendant's counsel of choice at the same preliminary hearing. *Gonzales-Lopez* held that once a defendant has been denied his counsel of choice, the Sixth Amendment violation is complete and automatic reversal is warranted. *Id.* at 2563. Thus, if the judge here, rather than forcing Ditch to proceed *without* an attorney, had forced Ditch to proceed with a *different* attorney, *Gonzales-Lopez* would require automatic reversal of his conviction. As several commentators have recognized, this anomaly has created confusion among the lower courts and provides yet a further reason to grant review. See *Right to Counsel: Denial of Counsel at Critical Stage Didn't Give Rise to Presumption of Prejudice*, 80 CRIM. L. REP. 620 (2007) (discussing the conflicting logic of the Third Circuit's rule and *Gonzales-Lopez*); *Right to Counsel: Reversal Not Automatic for Denial of Counsel at Probable Cause Hearing*, 79 CRIM. L. REP. 702, 703 (2006) (reading *Gonzales-Lopez* to suggest that this Court "might take issue with the Fourth Circuit's ruling [in *Owen*]," on which the decision below relied); cf. *Supreme Court—Leading Cases*, 120 HARV. L. REV. 203, 207 (2006) (discussing the "obvious incongruity" between *Gonzales-Lopez* and the Court's ineffective assistance of counsel decisions).

3. Rather than address the conflict among the circuits or the conflict between the decision below and *Gonzalez-Lopez*, respondent simply asserts without explanation that the decision below "does not create a new subset of Sixth Amendment violations involving complete denial of counsel at a critical stage that are not subject to the *United States* v. *Cronic*, 466 U.S. 648 (1984), presumption of prejudice." Opp. 6. But respondent does not explain how the decision below can be squared with *Cronic*. The Court there explained that a "complete denial of counsel" at a "critical stage of [the defendant's] trial" was one of "three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in particular case is unjustified.'" 466 U.S. at 659. "The Court has uniformly found constitutional error without any showing of prejudice," the Court continued, "when counsel was * * * prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25 (collecting cases).

The court below expressly acknowledged that the preliminary hearing in Pennsylvania is a "critical stage" of the prosecution and that, as a result, the protections of the Sixth Amendment apply. Pet. App. 53a-54a. But rather than apply *Cronic*'s requirement of automatic reversal "without any showing of prejudice" (466 U.S. at 659 n.25), the court below concluded that the denial of counsel at the outset of a criminal proceeding—where an identification is made, and testimony and evidence subsequently used at trial are introduced—may or may not require reversal, depending upon whether, all things considered, the deprivation was "harmless." Pet. App. 55a. Such an approach is flatly inconsistent with this Court's analysis in *Cronic*.

Even since the filing of the petition, other courts have recognized the need to reconcile this Court's jurisprudence on the denial of "assistance of counsel" under *Cronic* and the denial of "counsel of choice" under *Gonzales-Lopez*. In

State of Oregon v. *Miller*, 2007 WL 2380282 (Or. App. Aug. 22, 2007), the court harmonized the two lines of cases into a single test. Citing both *Cronic* and *Gonzales-Lopez*, the court noted that the inquiry into whether a harmless error analysis was appropriate involved two questions: (1) was the proceeding for which counsel was denied a "critical stage" at which the defendant was entitled to counsel; and (2) if so, was there a *complete* denial of counsel during that critical stage. *Id.* at *6. Once the court concluded that the denial of counsel was not complete and, thus, that the presumption of prejudice from *Cronic* and automatic reversal under *Gonzales-Lopez* did not apply, the court analyzed the issue using a harmless error analysis. *Id.* at *7-8. But the court's decision recognizes that where, as here, the denial of counsel at a critical stage is complete, *Cronic* and *Gonzalez-Lopez* together require automatic reversal. This Court's guidance is needed to confirm that this is so.

4. Respondent attempts to defend the decision below on the merits by asserting that the court properly applied the "harmless error" test in affirming the conviction. Of course, this analysis is irrelevant if the harmless error standard should not have applied, and the important point is that the courts are divided on that question. But in any event, respondent does not deny that a preliminary hearing is a "critical stage" of the prosecution, or that there are good reasons for treating it as such. Indeed, respondent does not even mention the preliminary hearing that is the focus of this appeal, much less address the adverse consequences of the constitutional violation. Opp. 2-4.

As we explained in the petition, the prosecution at the preliminary hearing in this case questioned an eyewitness who later testified at trial, as well as a police officer that was subsequently unavailable at trial. The prosecution also introduced other evidence (*e.g.*, ballistics test results and a phone trace) at the hearing that was used against Ditch at his trial. But despite Ditch's strenuous objec-

tions, at no point during the hearing did counsel represent him. Without the benefit of counsel, Ditch was unaware of, and thus failed to exercise, his rights under Pennsylvania law to cross-examine witnesses and inspect physical evidence, call witnesses on his behalf, offer evidence on his behalf, testify, or make written notes of the proceedings. 234 Pa. Code 542(C) (1998). The preliminary hearing, then, was indeed "critical," and the presumption of prejudice requiring automatic reversal should have been applied.

5. Respondent further argues that the court below correctly applied *Gilbert* v. *California*, 388 U.S. 263 (1967), and *Moore* v. *Illinois*, 434 U.S. 220 (1977), with respect to the uncounseled pretrial identification. Opp. 4-5. But, like the court below, respondent ignores the other aspects of the Sixth Amendment violation, including Ditch's inability to cross-examine the State Trooper who was unavailable at the later trial, the impact of the other evidence introduced at the preliminary hearing (ballistics, phone trace), and the lost opportunity to develop information that could be used to prepare an effective defense—all of which were compounded by the deficient performance of counsel at trial. See Pet. App. 63a ("[W]e conclude that Ditch's trial counsel's performance fell below an objective standard of reasonableness.").

6. Respondent also contends that the decision below is but a correct application of *Coleman* v. *Alabama*, 399 U.S. 1 (1970). Opp. 5-6. But while the Court there remanded a case involving the denial of counsel at a preliminary hearing for a determination whether the denial was harmless, the trial court in that case had scrupulously prohibited the use at trial of any of the evidence or testimony gathered at the uncounseled hearing. *Id.* at 10-11. The same cannot be said of Ditch's trial, as the eyewitness identification, evidence, and other testimony from the preliminary hearing were all admitted and used against him at trial. Thus,

this case more closely resembles *White* v. *Maryland*, 373 U.S. 59 (1963), wherein the Court vacated the defendant's criminal conviction *without* a showing of prejudice because an admission of guilt at an uncounseled preliminary hearing was later used against the defendant at trial. This is especially evident after *Cronic* and *Gonzales-Lopez*, which make clear that automatic reversal is warranted where a party is subject to a complete denial of counsel at a critical stage of the prosecution. But even if respondent's reading of *Coleman* were correct, that would not change the fact that the lower courts remain divided over the circumstances in which denials of counsel at critical stages of the prosecution require automatic reversal. Only this Court can clear up that confusion. See also *Salemo*, 61 F.3d at 222-224 (Alito, J. concurring) (contrasting *Coleman* with *White* and other cases).

7. Finally, respondent simply ignores our demonstration that the question presented is important and recurring even apart from the fact that it conflicts with various other circuit court decisions and with this Court's decisions. Some 35 States and the federal courts conduct preliminary hearings like those below, and the hearings number in the tens of thousands annually. The decision below, moreover, renders the protections of the Sixth Amendment—which the framers deemed vitally important, and which remain a vital check on governmental abuse today (see Pet. 22-23)—largely illusory, while at the same time spawning unnecessary litigation over their application. A clear rule that denials of counsel at critical stages of the prosecution warrant automatic reversal will deter Sixth Amendment violations and ensure that criminal defendants receive the fair trials to which they are constitutionally entitled. Respondent's failure to address these points further confirms that review is warranted.

* * * * *

In summary, six federal circuits and at least one state supreme court are divided over the question whether the complete denial of counsel at a critical stage of a criminal prosecution warrants application of harmless error analysis or automatic reversal. Moreover, the question has implications for thousands of other cases annually, not only in Pennsylvania but in 35 other States and in the federal courts. The petition should be granted to resolve this confusion and to make clear that the Sixth Amendment guarantee of the right to counsel may not, based on after-the-fact harmless error analysis, be abrogated at any critical stage of a criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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